120-701

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1885.

No. 703

RICHARD VITERBO, APPELLANT,

vs.

SAMUEL FRIEDLANDER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 12, 1885.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1885.

No. 1089.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 *Petition. Filed October 2nd, 1884.*

To the hon. the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of Richard Viterbo, a citizen of the French Republic, respectfully represents that your petitioner, on the 29th & 27th of October, 1883, leased from Samuel Friedlander, a citizen of the State of Louisiana, a certain sugar plantation in the parish of St. Charles, known as the Friedlander plantation, with the growing cane crop then standing, for the period of five years, to end Dec'r 15th, 1883, at the rate of five thousand dollars per annum, represented by five promissory notes, numbered from 1 to 5, and payable respectively on the 1st December, 1883, 1884, 1885, 1886, & 1887, bearing 8% interest per annum from maturity, the first of which notes has been paid.

Your petitioner further represents that during the high water of 1884 the levees in the neighborhood of said leased plantation protecting the same from overflow gave way without any fault of your petitioner, and the water of the Mississippi river completely covered said plantation to the depth of several feet, and entirely destroyed the sugar cane, filled the draining ditches, and did other damage to said plantation, which it is unnecessary to enumerate, so that it ceased to be fit for the purpose for which it was leased.

That petitioner's only motive in leasing said sugar plantation and growing crop of sugar cane was to raise and produce sugar.

That petitioner is only the lessee and not bound to replace
2 the property with its growing crop of sugar cane in the same condition it would have been had the crevasse not occurred; that said property was destroyed without the fault of petitioner.

That on the 29th of July, 1884, your petitioner, through the undersigned attorney, notified the lessor to replace the two hundred and fifty acres of cane leased to him, but said lessor, through his attorneys, Mess. Braughn, Buck & Dinkelspiel, "denied and repudiated *in toto* the obligation imputed to him of replacing either plant or stubble cane."

That the refusal of said lessor "to maintain the thing in a condition such as to serve for the use for which it is hired" annulled the lease.

Your petitioner avers that in its present condition the property leased has been totally destroyed as a sugar plantation.

Wherefore petitioner prays that Samuel Friedlander be cited hereto, and, after due proceedings, that the lease entered into between petitioner and said Friedlander be annulled and set aside, and that said Friedlander be condemned to return to petitioner his four rent notes of five thousand dollars each, due respectively 1st of December, 1884, 1885, 1886, and 1887, and that he be condemned to pay all costs, and petitioner prays for general relief, &c.

(Signed) CH'S LOUQUE, *Att'y.*
" ALBERT VOORHIES.

Citation issued 2nd October, 1884.

1—1089

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

3 Circuit Court of the United States, Fifth Circuit and Eastern District of La.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

The President of the United States of America to Samuel Friedlander, Greeting:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or to deliver your answer to the same in the office of of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 2d day of October, A. D. one thousand eight hundred and eighty-four, and of the Independence of the United States of America the 109th year.

Teste: [SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received Oct. 2, 1884, by the U. S. marshal, and on the 3 day of Oct., 1884, I served a true copy of the within citation and accompanying petition on S. Friedlander, defendant herein, by handing the same to him in person in the city of New Orleans.

(Sig.) J. R. G. PITKIN,
U. S. Marshal, E. D. of La.
DAN ROSE,
D'y U. S. Marshal.

4 *Peremptory Exception. Filed October 17th,* 1884.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

To the Hon. the judges of the U. S. circuit court for the fifth circuit and eastern dist. of Louisiana.

And now in this hon. court, through undersigned counsel, comes the defendant, and for peremptory exception to plaintiff's suit pleads that the petition herein discloses no cause of action.

And he prays that this exception be maintained and plaintiff's suit dismissed with costs, and for general relief, etc.

(Signed) BRAUGHN, BUCK & DINKELSPIEL, *Att'ys.*

Supplemental Petition. Filed October 27th, 1884.

To the hon. judges of the circuit court of the United States for the eastern district of the State of Louisiana.

The supplemental petition of Richard Viterbo, a citizen of the Republic of France, respectfully represents:

That on the 27th & 29th days of October, 1883, as per annexed acts made a part hereof, your petitioner leased from Samuel Friedlander, of said parish, a sugar plantation, situate in the parish of St. Charles, in this State, known as the "Friedlander plantation," for a period of five years, to end 15th December 1888, at the rate of five thousand dollars per annum, represented by five promissory notes, payable respectively on the 1st day of December 1883, 1884, 1885, 1886, and 1887, with eight per cent. per annum interest from maturity, the first of which notes has been duly paid.

That said Friedlander leased unto petitioner the standing crops of cane as it then stood, all of which the latter bound himself to plant as seed cane on said plantation, and also to leave on said plantation, for the sole use and benefit of said lessor, at the termination of this lease, December 15th, 1888, eighty-five acres of seed cane (such as is usually called first year's stubble), and also not less than two hundred acres of stubble from what is called plant cane, which shall be properly protected in the ground. And said lessee bound himself to deliver said plantation at the expiration of this lease with the ditches in good draining condition, not allowing the filling up of said ditches during the last year of this lease any more than ditches usually fill up in one year on a well-managed sugar plantation in good cultivation. And said lessee also bound himself to return, at the expiration of said lease, thirty loads of cured hay in the stable, and one hundred and eighty-five measured cords of fire-wood piled in ranks around the sugar house, in satisfaction of an equal number thereof on the premises at the date of the lease.

Petitioner avers that in the spring and summer of the present year (1884) there was an extraordinary rise of the river Mississippi, such a rise as was wholly unforeseen and could not have been foreseen. That owing to rapid changes in the bed of the said river, and from divers other causes as were not contemplated at the date of the said contract of lease, such an extraordinary and unforeseen rise has taken place in the Mississippi river increasing manifold the difficulties of protecting the river plantations against crevasses and overflows. That this was more especially the case at and in the vicinity of the said Friedlander plantation. That without any fault, negligence, or carelessness on the part of petitioner, and strictly by extrordinary *vis major*, the levees at the Davis plantation were, on the 9th of March, 1884, overwhelmed by the extraordinary flood and a crevasse occured which flooded the Friedlander plantation. That energetic efforts were made by all parties concerned and by the State and by petitioner to close the crevasse, but without success. That the waters of the Mississippi river completely covered said plantation to the depth of several feet

and entirely destroyed the sugar cane crop then growing, filled and levelled the ditches and canals of said plantation, and swept away the cord wood and fences and also much or all of the aforesaid hay. That at present the waters have receded and the said plantation appears as a wreck, and indeed, in its present condition, has ceased to be fit for the purposes for which it was leased; and finally that, as a sugar-plantation, situated as it is on said river, it is practically destroyed.

That to put said lessor in default petitioner, on the 29th July, 1884, notified said lessor to replace the two hundred and fifty acres of cane on said plantation, and to have said plantation restored to its previous condition as regards the ditches and canals, but said lessor has peremptorily refused to comply with said demand. That petitioner is entitled to the dissolution of said lease and to recover from said lessor the sum of five thousand dollars, amount of the first rent note which he paid over to said lessor, and also the amount invested by him under the said contract of lease in order to make the
7 contemplated improvements which were necessary for the successful cultivation of said sugar plantation, to wit: The sum of fourteen thousand dollars invested in canals, ditches, and other permanent improvements to the land itself and enhancing its value correspondingly. That by said lease petitioner bound himself to plant as seed cane on said plantation all of the growing crops of 1883 then standing in the field, which condition petitioner fulfilled, and so has petitioner complied with all the other stipulations of said lease.

Wherefore petitioner prays for leave to file this his supplemental petition; that the same be served upon said Samuel Friedlander, with citation, in due course; that judgment be rendered in favor of petitioner against said Samuel Friedlander, as prayed for in the original petition; that, furthermore, petitioner recover of said Friedlander the sum of nineteen thousand dollars, with legal interest.

Prays for general relief. And, as in duty bound, etc.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES, *Att'ys.*

Order.

Let this supplemental petition be filed as prayed for.
New Orleans, October 27th, 1884.
(Signed) DON A. PARDEE, *Judge.*

Exception Submitted.

Extract from the Minute-Book, Special Term, 1884.

8 NEW ORLEANS, THURSDAY, *October* 30*th*, 1884.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

This cause came on to be heard on the exception filed by defend-

ant, and was argued by the counsel for the parties, respectively, and submitted; and the court took time to consider.

Plea Overruled and 10 *Days allowed to Answer.*

Extract from the Minute-Book of Saturday, November 8th, '84.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

This cause came on to be heard on the peremptory exception of no cause of action filed by defendant, and was argued by counsel.

On consideration whereof it is ordered that the plea be overruled and that defendant be allowed ten days from this date to file his answer herein, counsel for plaintiff agreeing thereto in open court.

Supplemental Petition. Filed November 15*th*, 1884.

9 To the hon'l justices of the circuit court of the United States for the eastern district of Louisiana.

The supplemental petition of Richard Viterbo respectfully represents:

That he reiterates the allegations contained in his original petition, and more especially that he has leased from the defendant the said Friedlander plantation.

That by the unpreceedented rise of the Mississippi river this spring and summer, an event that could not be foreseen, and by the consequent happening of the Davis crevasse on the 9th day of March, 1884, and without any fault on the part of petitioner, said sugar plantation was flooded and destroyed as a sugar plantation.

That the same is covered by a heavy deposit of sand, leaving no trace of the canals, ditches, fences, cane, and other crops; that the said property is wholly unfit for the use which the parties entered in the said contract of lease, a copy of which lease is annexed as a part hereof.

That the petitioner is entitled to have the dissolution of said lease decreed, and to have said Samuel Friedlander to take back said property and return to him the four rent notes, of each five thousand dollars, not yet matured, and to pay over to the plaintiff or reimburse him the sum of four thousand dollars paid by him to said Friedlander, being amount of the first rent note.

That since the aforesaid destruction of the object leased plaintiff did not owe any rent, but is entitled to the repetition of said payment of four thousand dollars. Petitioner further avers that he holds said plantation, mules, etc., subject to the order of said defendant. That the same are costly to keep, and all expense incurred by petitioner for their preservation should be paid to him by

the defendant hereof, S. Friedlander. That said expense
10 amounts to the sum of, first, 50 cts. a day for each of the thirty-six mules and one dollar a day for the keeper thereof; and, second, the sum of ten dollars a day to watch the building construction and improvement thereon, and prevent spoliation thereof; making the sum of per-day expenses which thould be reimbursed to your petitioner for every day that said plantation has remained in petitioner's charge, from the 9th day of March, 1884, until the possession of the same is resumed by the said Friedlander.

Wherefore petitioner prays leave to file this supplemental petition; that defendant be duly cited to answer hereto; that judgment be rendered as prayed for in his original petition, and that said Friedlander be furthermore condemned to pay petitioner, first, four thousand dollars, with legal interest from the 9th of March, 1884, and, second, the sum of nineteen dollars per day for every day from said 9th of March, 1884, until possession be resumed of said plantation, mules, etc., by said Friedlander.

And petitioner prays for cost of court, and general relief, as in duty bound.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES,
Att'ys for Petitioner.

Order.

Let this supplemental petition be filed, as prayed for.
New Orleans, November 15th, 1884.
(Signed) DON A. PARDEE, *Judge.*

Exception to Original and Supplemental Petitions. Filed November 24th, 1884.

To the honorable the judges of the circuit court of the United
11 States for the fifth circuit and eastern district of Louisiana:

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

And now again appears the defendant, S. Friendlander, through undersigned counsel, and reserving the benefit of the exception hereinbefore taken to plaintiff's original petition for further exception to the plaintiff's petition and supplemental petitions filed respectively on the 27th of Oct. and the 15th of Dec., 1884, shows:

1st. That said petitioner's original and two supplemental petitions taken and construed with reference to the certified copy of the contract of lease annexed and now filed as part hereof disclose no cause of action.

2nd. That even if it should be held that on the face thereof said petitions disclose a right or cause of action to demand the nullity and rescission of the contract of lease, no cause or right of action is shown for recovery of the pretended disbursements by plaintiff on the Friedlander.

3rd. In the same event no right or cause of action is shown in said petition to demand return of the rent paid or of any portion thereof.

4th. The allegations of said petitions are vague and indefinite and insufficient on the pretended demand for damages or expense of keeping and maintaining said plantation, and such demand cannot be entertained unless it is alleged (and proved) that a tender has been made of the plantation, together with tender of fulfilment and compliance of and with each and every obligation of
12 the lease.

5th. The said petition and supplemental petitions contain contradictory demands and such loose, vague, and indefinite allegations that this appearer cannot safely plead or answer thereto.

Wherefore he prays that these exceptions be sustained; that this suit be dismissed accordingly, in whole or in part, to the extent that the exceptions may to the court seem well taken; and in any event that plaintiff be ordered to amend his petition or petitions wherein the same are contradictory, vague, and uncertain, or in default thereof that plaintiff's suit be dismissed with costs; and he prays for general relief, etc.

(Signed) BRAUGHN, BUCK AND DINKELSPIEL,
Att'ys.

Answer and Documents, etc. Filed December 1st, 1884.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

R. VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

And now, in this honorable court, through undersigned counsel, comes the defendant, and reserving the benefit of the exception hereinbefore filed to plaintiff's original petition, for answer thereto denies generally and specially each and every allegation therein contained, except as may be herein admitted.

13 And respondent, further answering, admits the execution of the contract of lease evidenced by two certain notarial acts made and signed before W. O. Hart, N. P., on the 27th and 29th days of October, 1883, respectively, and this respondent annexes certified copies of said acts to his answer and files them as part thereof.

And, further answering, respondent admits that he was informed and believes that during certain portions in the earlier part of the year, when the waters of the Mississippi river were at their usual spring rise or flood, the levee or levees along its banks intended to protect the country from overflow within a few miles of the leased property gave away, inundating the country to a greater or less extent, in regard to which respondent has no accurate knowledge or information.

Further answering, he avers that if, as alleged in plaintiff's pet-

tion, said plantation was overflowed or covered with water, it was only to a very moderate depth from what is called backwater, and which to a great extent could have been provided and guarded against if proper and early precautionary measures had been applied, which it was the duty of said lessee to do.

And respondent specially denies that said overflow damaged the said plantation so as to make it unfit for the purpose for which it was leased, and he, respondent, avers that said overflow caused no other damage than such as, under the terms of the lease and the law of the land, said lessee was bound to repair or sustain the consequences thereof.

And respondent further specially avers that no part of the leased property was either totally destroyed or so injured as to make it unfit for the use intended; that the alleged loss or destruction of sugar-cane is not a destruction of leased property, but a destruction of the property of lessee, the loss of which he alone under his contract, as well as under the law of the State, must bear, and said destruction and loss of "sugar-cane," nor the filling of drainage ditches, either or both together, make a lawful cause for the annulment and rescission of the contract of lease.

And respondent further avers that an "overflow" of the Mississippi river or a "crevasse" is not an unforeseen event in the meaning of the law, and all the consequences of the happening thereof must be left on those directly affected without recourse at law or in equity.

And, answering further specially to the allegation in plaintiff's petition that he made demand on the lessee "to replace the two hundred and fifty acres of cane leased," etc, this respondent specially denies, 1st, that he ever leased to plaintiff "two hundred and fifty acres of cane," or any cane whatever; and, 2d, he denies that he ever refused "to maintain the thing in a condition such as to serve for the use for which it is hired," and in connection with the 1st point above stated, that he, respondent, did not lease to plaintiff any sugar-cane, respondent, quoting from the contract itself, avers that he, the lessor, "did give unto said lessee all of the growing cane crop of 1883 now standing in the field, which the lessee expressly binds himself to plant as seed cane on said plantation, and to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation, for the sole use and benefit of said lessor at the termination of this lease, December 15th, 1888, eighty-five acres of full standard seed cane, such as is usually called first year's stubble, which has been thoroughly cultivated, cut at the proper time for sowing seed, and carefully wind rowed, especially for seed; and, in addition thereto, said lessee shall also leave on said plantion for said lessor not less than two hundred acres of stubble, from what is called plant cane, which shall be properly planted in the ground." Now, respondent shows that he had fully complied with this stipulation in the contract of lease; that the lessee received the amount of cane specified and planted from same, and his, lessee's, growing crop was in the ground when said alleged overflow occurred.

And now, again referring to the demand aforesaid, respondent

avers that for the reasons herein stated he declined and refused to replace said —, holding that he was not under obligation either by the terms of his contract or the effect of the law governing the relations of the parties herein.

And respondent makes copy of letter dated June 4th (delivered to defendant, S. Friedlander, July 28th) annexed as document "B" a part of this answer.

And respondent, referring to his denial that he ever refused to perform any of his obligations under his lease, makes and files as part of this answer and as document "C" letter dated ——, signed by Braughn, Buck, and Dinkelspiel, att'ys, being the letter in which the alleged refusal as set forth in plaintiff's petition was made.

And respondent specially avers that, as shown by said letter "C," written by his said attorneys, which he authorized and approved, he was at all times and is now ready and willing to do and perform all just and lawful duties and obligations in regard to the maintainance of the leased property. That no notice other than that in said letter of June 4th was given, although the lessee has, under the provisions of articles 2693 and 2694, R. C. C., a perfect and easy remedy to compel the lessor to make such repairs as he may be bound to make under the law or the contract of the parties.

16 And respondent is informed and verily believes and so alleges that plaintiff's suit is without merit in law or in equity; that it is not true in any sense that the "Friedlander plantation," the property leased, has been rendered unfit for use as a sugar plantation; that if any damage or filling up to draining ditches was done it was no greater than is usual in the course of a season, and their repair and maintainance in proper condition is an obligation expressly assumed by the lessee; and even if it were not and if it were the duty of the lessor, this respondent, said lessee, should have made specific demand for such repairs, and in no event would the failure of the lessor to make said repairs constitute a ground for annulment of said lease.

Wherefore, and for such other reasons as will be shown to this hon. court at the trial of this cause, respondent respectfully prays that plaintiff's suit be dismissed at his costs; and he prays for general and equitable relief, and as in duty bound, etc.

(Signed) BRAUGHN, BUCK & DINKELSPIEL, *Att'ys.*

(4) Documents filed with answer. (1.) No. 10667. Copy of lease. Sam'l Friedlander to R. Viterbo. October 27th, 1883.

STATE OF LOUISIANA, *Parish of Orleans:*

Be it known that on this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundredth and eighth, before me, William Octave Hart, a notary public, duly commissioned and qualified, in and for this

17 parish and State, and in presence of the witnesses hereinafter named and undersigned, personally came and appeared Samuel Friedlander, a resident of this city, who declared that he

does by these presents, for the time and on the conditions hereinafter set forth, lease, let, and hire unto Richard Viterbo, of Paris, France, but now residing in this State, here present accepting same, acknowledging delivery and possession thereof, the following-described property, to wit:

A sugar plantation, situated in the parish of St. Charles, in this State, known as "Friedlander's plantation," and adjoining the "Edmee plantation" in the same parish, and now belonging to the present lessee, and with said plantation (which embraces all the land in said parish owned by said lessor), and also leased all the buildings, outhouses, fences, and other appurtenances thereof, consisting of one sugar house, with purgeries and large cane shed containing boilers, engine, mill, cane carrier, open sugar kettles, six cypress juice boxes, thirty cypress sugar boilers, one railroad sugar car, and two lime boxes, and on the outside one rain-water cistern; and around said sugar house are nine frame double cabins, and the other buildings on said plantation are one frame blacksmith shop, four frame cypress double cabins, eight frame fine double cabins, one large frame "hospital," one large frame cypress corn-crib, one large frame cypress stable, one manager's residence or dwelling, one frame cypress storehouse, one brick pigeon house, and other small buildings around said dwelling, such as chicken houses, overseer's horse stable, etc., all of wood; which said buildings, fences, outhouses, etc., are to be returned to the lessor at the expiration of this lease in equally as good condition and order as they now are, and any improvements, repairs, or alterations of
18 any kind whatever that may be made to said buildings or appurtenances shall be at the sole expense of the lessee, and at the expiration hereof shall revert to and become the property of the lessor without compensation or payment.

And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field, which the said lessee expressly binds himself to plant as seed cane on said plantation; and to reimburse said lessor for said cane crop said lessee binds himself to leave on said plantation for the sole use and benefit of said lessor, at the termination of this lease, December 15th, 1888, eighty-five acres of full-standed seed cane (such as is usually called first-year's stubble), which has been thoroughly cultivated, cut at the proper time for saving seed, and carefully windrowed, especially for seed; and, in addition thereto, said lessee shall also leave on said plantation for said lessor not less than two hundred acres of stubble from what is called plant cane, which shall be properly protected in the ground.

Should said lessee not have cut and hauled, or otherwise taken away, his crop of the year 1888 before the expiration of this lease, Dec. 15th, 1888, he is then to have the right and privilege until December 31st, 1888, of cutting and removing whatever of said crop belonging to him remain on said plantation; but said lessee must, on or before December 15th, 1888, deliver possession of said plantation to said lessor, his representatives, heirs, or assigns, and otherwise comply with all the conditions of this contract.

And said lessee binds himself to deliver said plantation at the expiration of this lease, with the ditches in a good draining condition, sufficiently so for the proper cultivation of as much land as may have been under cultivation by said lessee during
19 his fourth year's occupancy of said plantation; and the foregoing clause means that said lessee shall not neglect nor allow the filling up of said ditches during the last year of this lease any more than ditches usually fill up in one year on a well-managed sugar plantation in good cultivation.

And the said lessor further declared that he leaves with said lessee, to be used in the culture of sugar cane on said plantation, thirty-four mules, the possession of which is hereby acknowledged, and which both parties hereto have appraised at the sum of thirty-seven hundred dollars, which mules, or an equal number thereof, shall be delivered to said lessor with said plantation at the expiration of said lease; and if the mules so delivered should be of less value than $3,700.00 then the difference to be made good to the lessor, either in money or mules, the valuation to be fixed by the parties hereto if they are able to agree; otherwise, by a third party, selected by them, whose decision shall be final and binding: Provided, That in lieu of delivering any mules the lessee is to have the privilege of paying to the lessor the sum of $3,700.00 in cash on said December 15th, 1888, in full settlement of the obligations set forth in this paragraph.

And said lessor further leaves with said lessee the following articles for use on said plantation, the possession of which is hereby acknowledged, and which are valued in block at the sum of five hundred dollars, to wit: 8 big cane carts; 5 small carts; one water cart; 2 No. 1 plows; 17 No. 2 plows; 12 No. 3 plows; 1 No. 4 plow; 4 No. 2 harrows; 4 No. 3 harrows; 1 No. 4 harrow; 3 flukes; 2 stubble diggers; 2 scrapers; 125 single trees; 6 fifth chains; 23 pairs traces; 50 pairs hames; 30 mule collars; 30 cart bridles; 12 cart saddles; 12 cart breechings; 30 hoes; 30 grubbing hoes; 24
20 spades; 14 shovels; 9 axes; 50 cane knives; 15 scythes; 12 bush hooks; 4 hooks for pulling seed cane in windrow; 1 corn shovel; 4 hooks for spreading bagasse; 6 iron buckets; 3 wheelbarrows; 15 padlocks; 1 scale; 2 short handle shovels; 2 grindstones; 3 iron pitchforks; sundry blacksmith tools; small lot of cypress lumber; small lot of oak lumber; 4,000 shingles; 2 barrels of coal; 4 small lanterns; 1 cross-cut saw; and 4 pounds of nails; and at the expiration of this lease, in lieu of returning the foregoing articles to the lessor, the lessee promises to pay in cash the sum of $500 on said December 15th, 1888.

And said lessor also leaves with the said lessee, as the latter hereby acknowledges, thirty loads of cured hay in the stable and one hundred and eighty-five measured cords of fire-wood, piled in ranks around the sugar house; and said lessee binds himself to return to said lessor at the expiration hereof an equal amount of cured hay in the stable and an equal amount of fire-wood piled in ranks around the sugar house.

It is well understood that no cypress timber nor fire-wood is to be

cut from said plantation during the term of this lease, except such as is necessary for the use of the plantation.

And the said lessor and lessee severally declared that the term of the lease herein made shall be considered as commencing on September 27th, 1883, and as ending on December 15th, 1888.

This lease, in addition to the obligations herein assumed by the lessee as above set forth, is made and accepted for and in consideration of the price and sum of twenty-five thousand dollars ($25,000.00), payable by said lessee as hereinafter set forth, and to represent said amount said lessee has furnished five certain promissory notes drawn
21 by him to the order of said Samuel Friedlander, all dated said September 27th, 1883, each for the like sum of five thousand dollars, numbered from 1 to 5, and payable respectively on the first days of December, 1883, 1884, 1885, 1886, and 1887 at the Citizens' Bank of Louisiana, and stipulating to bear eight per cent. per annum interest from maturity until final payment, and said notes read that they are in advance for rent of said Friedlander's plantation for the respective years of 1884, 1885, 1886, 1887, and 1888, which said notes, after having been paraphed "*ne varietur*" by me, notary, for identity herewith, were delivered to the said lessor, as he hereby acknowledges.

And in the event that any of said notes should not be punctually paid at maturity, the whole amount of this lease, represented by the unpaid notes, whether matured or unmatured, shall immediately become due and exigible; and in case of suit for the recovery of said notes or any of them the said lessee binds himself to pay as attorney's fees five per cent. on the amount sued for.

And said lessee further binds himself to put nothing on said plantation that will forfeit the insurance effected by said lessor on the sugar house herein leased; and he further binds himself not to make any sub-lease of said plantation nor of any part thereof, without the consent of the lessor, who reserves to himself the right of annulling this lease without previous notice, should the lessee at any time fail to pay the rent as stipulated, or otherwise violate this contract.

Thus done and passed in the presence of Justus Vairin and Ernest Cuculler, competent witnesses, both of this city, who hereto sign with said parties and with me, the notary.

Original signed.

SAM'L FRIEDLANDER.
R. VITERBO.
JUSTUS VAIRIN.
ERNEST CUCULLER.

A true copy.

[SEAL.] (Sig.) W. O. HART,
Not. Pub.

22 *No.* 10667, *October 29th*, 1883. *Copy Modification of Lease, S. Friedlander to R. Viterbo.*

STATE OF LOUISIANA, *Parish of Orleans:*

Be it known that on this twenty-ninth day of October, in the year of our Lord one thousand eight hundred and eighty-three, before me, William Octave Hart, a notary public, duly commissioned and sworn, in and for the parish and State, personally came and appeared Samuel Friedlander, a resident of this city, who declared that by act, before the undersigned notary, dated October 27th, 1883, he leased unto R. Viterbo a certain plantation situated in the parish of St. Charles, in this State, for the term running from September 27th, 1883, to December 15th, 1888, under certain stipulations set forth in said act.

That one of the conditions of said lease was that the lessor should make no sub-lease of said plantation, nor of any part thereof, without the consent of the lessor.

And the said appearer declared that he does by these presents consent to the elimination of said prohibition from said lease, to the extent of allowing the lessee the privilege of making contracts for the cultivation on the tenant principle of portions of soid plantation, provided that nothing herein shall be considered as waiving or limiting the other of obligations of said lessee.

Thus done and passed in the presence of William S. Ingram and Justus Vairin, witnesses, both of this city, who hereto sign with said party and me, the notary.

23 (Original signed) SAML. FRIEDLANDER.

[SEAL.] W. S. INGRAM.
JUSTUS VAIRIN.
W. O. HART,
Not. Pub.

A true copy.

W. O. HART,
Not. Pub.

Document B. (3.)

NEW ORLEANS, *June 4th*, 1884.

S. Friedlander, Esq., New Orleans.

SIR: You are hereby notified that as soon as the water from the Davis crevasse shall have withdrawn you are expected to, first, put back the plantation leased by you to Mr. Viterbo in the same condition it was when you leased it.

Second. Replace the eighty acres of plant cane, more or less, and the stubble, making in all two hundred and fifty acres of cane.

You will understand that if the lease is not annulled by the crevasse Mr. Viterbo did not bind himself to pay the damages occasioned thereby.

As landlord, you must deliver to him and keep him in possession of the property leased.

24 Remaining respectfully,

(Signed) CH'S LOUQUE,
Att'y-at-Law.

Served on person July 29th, 1884.

(Signed) CH'S LOUQUE.

Document C. (4.)

Copy.

NEW ORLEANS, *July 30th*, 1884.

Chas. Louque, Esq.

DEAR SIR: Your communication to S. Friedlander, dated June 4th, delivered July 28th, on behalf of a lessee of a certain plantation, etc., has been referred to us for consideration and answer.

We are instructed to say, on behalf of Mr. Friedlander, that without now admitting anything as to the extent or damage or destruction caused by the "crevasse," that he denies and repudiates *in toto* the obligation imputed to him of replacing either "plant" or "stubble" cane.

As to your general demand "to put back the plantation in the same condition," etc., we can only say that while we can conceive damages which the landlord may be bound to repair, the vagueness of your demand makes it impossible for us to do more than say, if a more specific demand is made, that it will receive all due and proper consideration.

Yours, etc.,

(Signed) BBAUGHN, BUCK & DINKELSPIEL.

25 *Rule.*

Extract from the Minute-Book, November Term, 1884.

NEW ORLEANS, MONDAY, *December 1st*, 1884.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

On motion of Braughn, Buck & Dinkelspiel, attorneys for the defendant, and on suggesting to the court that it is apparent from the pleadings, the petition, and answer on file in this cause that the matters at issue between the parties fall within the equity powers and jurisdiction of this cause, and that the defendant is desirous to avail himself thereof, and have the cause tried as a case in equity, it is ordered that the plaintiff herein do show cause on Saturday, December 6th, 1884, at 11 a. m., why this cause should not be docketed on the chancery docket of this court and tried as a cause in equity.

Order to Docket on Equity Side of the Court.

Extract from the Minute-Book, November Term, 1884.

NEW ORLEANS, SATURDAY, *December 6th*, 1884.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

26 This cause came on to be heard on the rule of the defendant to transfer said cause to the equity side of the court, and was argued by counsel for the respective parties; whereupon and on consideration of the premises it was ordered and decreed that the rule be made absolute, and accordingly that said cause be docketed on the chancery docket of this court and tried as a cause in equity.

Supplemental Bill and Order. Filed December 17th, 1884.

To the hon. justices of the circuit court of the United States for the eastern district of Louisiana.

The amended and supplemental bill of Richard Viterbo, a citizen of France, against Samuel Friedlander, a citizen of Louisiana, United States, sets forth:

1st. That your orator filed this suit on the law side of the court; that peremptory exceptions of no cause of action were interposed by defendant; but, after hearing the same, were overruled, and said defendant ordered to answer to the petition filed in the premises, with which order defendant complied by filing answer accordingly; that subsequently said defendant moved to have said cause transferred to the equity side of this court, and, after hearing, it was so ordered by the court.

2. That your orator, reiterating the allegations of said petition, avers more particularly that said Samuel Friedlander did, in the month of ——, 1883, lease unto your orator the sugar plantation known as the Friedlander plantation, situate on the Mississippi river, right bank, in the parish of St. Charles, for a term of
27 five years, ending 15th December, 1888, at the yearly rental of five thousand dollars, payable in advance, as will more fully appear by reference to said contract of lease annexed as a part hereof.

3. That your orator furnished the defendant his five promissory notes accordingly; and in the month of January, 1884, he paid the first note due in advance for the rent of the year 1884.

4. That said estate was leased as a sugar plantation the same being at the time in a good state of cultivation with canals, ditches, drains, fences, and other appurtenances, as stated in said contract of lease. Your orator, binding himself to cultivate the same as a sugar plantation, to plant all the cane on said estate as a cane crop in 1884, to keep the said plantation in a proper state of cultivation, and on the

termination of said lease to deliver said sugar plantation to said Samuel Friedlander in a good condition as to canals, ditches, drains, etc., with cane at the termination of said lease, Dec. 15th, 1888, in the following proportion, to wit: Eighty-five acres of full stand seed cane (such as is usually called first year's stubble), and also not less than two hundred acres of stubble from what is called plant cane, which shall properly be protected in the ground.

5. That your orator has complied with all his obligations under said lease, and has invested a heavy hapital in improving said plantation, deepening and widening said canals and ditches, increasing the drainage facilities, and has actually planted all the plant cane left on said estate under the contract of lease, and has cultivated all the stubble on the premises which could be advantageously *be* cultivated until prevented by the overflow through what is known as the Davis crevasse.

6. That in the spring and summer of the year 1884 there was an extraordinary and unprecedented rise of the Mississippi
28 river from its tributaries down to the Balize, a rise that could not have been foreseen; that from several causes, about which there are diversities of opinion, but owing to recent and rapid changes in the bed of said river and possibly from other causes of a recent occurrence unknown to your orator, an unforeseen and disastrous rise has thus taken place in said river, as above stated, increasing manifold the difficulties of protecting the river plantations against crevasses and overflows; that said Friedlander plantation, which had not been subject to annual overflows, and which, as petitioner is informed and believes and so charges, has never been overflowed, nevertheless was inundated by water flowing through the Davis crevasse, a short distance from said Friedlander plantation, as above stated; that no fault or negligence is imputable to your orator in the premises; but, on the contrary, your orator acted with extreme care and diligence to prevent such occurrence and has conscientiously and faithfully discharged his duties in that respect as lessee.

7. That the river waters completely covered said plantation to the depth of several feet, entirely destroyed the cane crop standing in the ground and the fencing, levelled all the canals and ditches, and changed the very face of said plantation, so much so that it is destroyed as a sugar plantation, and rendered unfit for the purpose for which it was leased.

8. That said overflow took place in March, 1884, and said plantation remained under water for several months, and when the waters subsided it was found that immense deposits of sand or alluvial soil had been deposited on it, at certain places several feet deep, and obliterating the very appearance of a sugar plantation.

9. That as a consequence the said contract of lease was dissolved of right from said date of — March, 1884, and the mutual
29 rights and obligations of both lessor and lessee did then and there terminate; and your orator has simply continued to take charge of said plantation, to preserve the same, and deliver it over to defendant the moment the latter signifies his readiness to

take delivery thereof and return to your orator the remaining rent notes to be cancelled and otherwise indemnify him in the premises.

10. But your orator does not claim the right to retain said plantation until said Friedlander does make such restitution and indemnity, but is ready to deliver over said estate without any condition precedent, trusting that said restitution and indemnity will follow in due course. And your orator again tenders said plantation to said Friedlander without condition, as above set forth.

11. That, however, in a spirit of compromise your orator was willing to allow said Friedlander to continue said lease on reinstating said plantation as a sugar plantation, and for that purpose made a formal demand upon him to have the canal, and ditches reinstated and cane supplied in place of the crop destroyed; but said lessor refused to accept to accept the proffered adjustment.

12. That your orator fears that during the pendency of this suit said Samuel Friedlander may part with or transfer the four aforesaid promissory notes given for rent under said contract or lease, or institute or cause to be instituted suit thereon against your orator for the purpose of harassing him and thereby multiply suits in the premises, to your orator's great annoyance and injury.

To the end, therefore, that said defendant, Samuel Friedlander may, if he can, show cause why your orator should not have the relief herein, and in his original bill or petition prayed: May it please your honors to grant to your orator not only the most gracious writ of injunction of the United States of America issuing out of and under the seal of this hon. court, to be directed to the said Samuel Friedlander, to restrain him from transferring or disposing of said rent promissory notes, and from proceeding at law against your orator touching any of the matters in question, but also the writ of subpœna of the United States, to be directed to the said Samuel Friedlander, commanding him at a certain time and under a certain penalty therein to be specified personally to appear before this hon. court, and then and there full, true, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this hon. court shall seem meet.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES,
Solicitors.

Order.

Let, as within prayed, defendant show cause on Saturday, Dec. 20th, 1884, at 11 o'clock a. m., why a writ of injunction should not issue, and meanwhile let the defendant be enjoined from further proceedings herein.

New Orleans, 17th Dec'r, 1884.

(Signed) EDWARD C. BILLINGS, *Judge.*

Restraining Order. Issued December 17th, 1884.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

31 The President of the United States to Samuel Friedlander, Greeting:

Whereas it has been represented unto us in our said circuit court, on the part of Richard Viterbo, in a bill in equity lately exhibited against you touching certain matters and things therein set forth; and whereas the Honorable Edward C. Billings, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause whereby you are required to show cause on the 20th day of December, 1884, at 11 a. m., why an injunction should not issue as prayed for in said bill of complaint; and whereas the said judge has granted and allowed an order restraining you immediately and forthwith, and during the pendency of said motion for an injunction, to the full extent and effect as prayed for in said bill of complaint:

Now, therefore, in consideration of the premises, and of the allegations in said bill contained, you, the Samuel Friedlander, your agents, attorneys, and servants, and each of you, are hereby commanded and strictly enjoined, under the penalty of the law, that you, and each of you, absolutely refrain and desist from transferring or disposing of the rent promissory notes heretofore described in this cause, and from proceeding at law against complainant touching any of the matters in question.

And that you, the said Samuel Friedlander, your agents, attorneys, and servants, and each of you, remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of December, in in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

32 *Marshal's Return.*

Received Dec. 17th, 1884, by the U. S. marshal, and on Dec. 18th, 1884, I served a copy of the within restraining order on S. Friedlander, defendant herein, by delivering the same to him in person in the city of New Orleans.

(Signed) E. S. CURRY,
D'y U. S. Marshal.

Rule for Injunction, &c. Entered and Filed 17th December, 1884.

Circuit Court of the United States for the Eastern District of La.
In Equity.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

On motion of Ch's Louque and Albert Voorhies, solicitors for complainant, and on suggesting to the court that the plantation the subject-matter of this litigation has not been in possession of complainant since March, 1884; that he was dispossessed of the same; that the lease was annulled by the destruction of the property leased and is not now a sugar plantation; that your complainant has tendered said plantation back to the defendant, who refuses to accept the same; that your complainant is not desirous of running any greater risks than necessary; that this hon. court has decided that the plaintiff averred a- cause of action that the plaintiff threatened a suit at law on the notes in his possession:

It is ordered by this court that S. Friedlander do show cause on Sat., the 20th of Dec., 1884, why the plantation should not be leased at public auction and the proceeds deposited in the registry of this cour until further orders, why an injunction should not issue as prayed for in the bill, and why he should not deliver the rent notes now in his possession to the clerk of this hon. court, and why the bill now filed should not be substituted for the petition.

Marshal's Return.

Received Dec. 18, 1884, by the U. S. marshal, and on Dec. 18, 1884, I served a true copy thereof on S. Friedlander, def't, by delivering the same to him in person in the city of New Orleans.

(Sig.) J. R. G. PITKIN,
U. S. Marshal,
By E. S. CURRY,
D'y U. S. Marshal

33 *Answer to Amended and Supplemental Bill. Filed January 2nd, 1885.*

To the hon. the judges of the circuit court for the fifth circuit & eastern district of Louisiana:

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

The defendant, Samuel Friedlander, reserving his exceptions and the benefit of the pleadings herein filed, and now and at all times reserving all manner of benefit and advantage to himself of exception to the many errors and insufficiencies in complainant's amended and supplemental bill contained, for answer thereto, or so much thereof as this defendant is advised is necessary and material to an-

swer unto, says that he adopts as part of this answer in full the answer hereinbefore filed to complainant's original bill, and stands thereon.

And, further answering, this respondent denies that in fact or in law the said lease referred to by complainant has been dissolved or terminated, and avers that said complainant at all times did, and does and must now, hold said plantation as lessee, with all the obligations incident thereto.

And referring more especially to the charges and allegations in No. 11 of complainant's amended and supplemental bill, respondent denies that any demand for specific repair to the ditches and canals, or any portion of the leased premises, which he must keep in repair, was ever made upon him, if any repairs which he is bound in law to make are or were necessary, which is not admitted.

34 And as to the alleged loss and destruction of "cane" on said plantation respondent specially avers that same was in no sense a part of the leased property, but because, on the contrary, by the very terms of the contract of lease, copy of which is filed as part of the original answer and referred to here for greater certainty, the property of the lessee, to be used and consumed under certain conditions, and its equivalent restored to lessor at the expiration of the lease, at any and all events said cane being at the risk of said lessee, and its destruction, from any cause whatsoever, must be the loss of said lessee.

And in answer to specification or article "12" of said complainant's bill of complaint, he avers that he has no intention to part with or negotiate the promissory notes given to him in accordance with the terms of said lease; and, further answering, this respondent avers that he is informed and has reason to believe that said complainant herein is not acting in good faith, and is prosecuting this harassing and annoying litigation well knowing that he is not entitled to — relief sought by him, but with the hope of forcing this respondent into a consent to the annulment of the lease; respondent avers that said complainant is not entitled to the injunction by him prayed for, and this respondent should be permitted to prosecute his legal rights by suit at law against complainant for the enforcement of the material obligations of said lease.

And specially reserving all his rights to the enforcement, by proper proceedings at law or in equity, — his legal rights against said Viterbo, complainant, arising out of said contract of lease, this defendant denies all unlawful combination in said bill charged, without — that any other matter or thing material for him to make answer to, and not herein sufficiently answered, avoided, or

35 denied, is true, to the knowledge or belief of this defendant.

All of which matters and things this defendant is ready to aver and prove as this court shall direct, and prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) BRAUGHN, BUCK & DINKELSPIEL,
Solicitors.

The defendant, Samuel Friedlander, duly sworn, deposes and says that all the matters of fact in the foregoing answer contained are true and correct; and further deposes that all and singular the facts and allegations in the original answer herein filed on Dec. 1st, 1884, to plaintiff's original petition are true and correct.

(Signed) SAM'L FRIEDLANDER.

Sworn to before me, this Dec. 31st, 1884.

[SEAL.] (Signed) W. O. HART,
Not. Pub.

Order. Extract from the Minute-Book. November Term, 1884.

NEW ORLEANS, THURSDAY, *January 22nd*, 1885.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

R. VITERBO
vs.
SAM'L FRIEDLANDER. } No. 10667.

Upon motion of solicitors for the complainant, and after hearing solicitors for the defendant, and the same having been duly
36 considered by the court, and it appearing that said complainant is entitled to a preliminary injunction as prayed for in the bill filed December 17th, 1884:

Now, therefore, it is hereby ordered, adjudged, and decreed that an injunction be issued, pursuant to the prayer of said bill, strictly commanding, enjoining, and restraining defendant, Samuel Friedlander, his clerks, attorneys, or agents, from parting with, out of his custody, or endorsing, assigning, or negotiating the four certain promissory notes of the complainant fully described in the bill, and that he be likewise enjoined and restrained from proceeding at law to enforce said notes, or any of the obligations of the lease set forth in the bill, during the pendency of this suit or until the further orders of the court.

And the court doth further order and decree that before the issuance of said injunction the complainant do enter into a bond, in favor of the defendant, in the sum of twenty-five thousand dollars, with good and solvent security to the satisfaction of the court, conditioned, that in case the court should hereafter be of opinion that said injunction should not be perpetuated, that the principal and sureties on said bond be liable to the defendant for, and shall pay to him, the full amount of said notes in principal and interest, five per cent. attorney's fees on the amount thereof, and the reasonable costs and charges herein incurred by him, all as liquidated damages, and such other damages as he may sustain by reason of said injunction.

And that as to the other matters prayed for in the rule of complainant filed December 17th, 1884, the court doth deny the relief asked, as same is not properly allowable.

37 And it is finally ordered that the complainant be notified of this order, and that he be allowed ten days to furnish the bond herein required, and should he be in default at the end of that time this order for injunction will fall.

Replication. Filed January 23rd, 1885.

Circuit Court of the United States for the Eastern District of Louisiana.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

Replication of R. Viterbo to the answer of defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient to the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed, or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

(Signed) CH'S LOUQUE,
(Signed) A. VOORHIES,
Solicitors.

38 *Motion to Appoint Examiner. Entered & Filed January 23rd,* 1885.

Circuit Court of the United States for the Eastern District of Louisiana.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

On motion of Ch's Louque & A. Voorhies, solicitors for complainant, and on suggesting to the court that the replication has been filed and that the parties are ready to commence taking proofs and evidence:

It is ordered by the court that A. G. Brice, Esqr., be and he is hereby appointed examiner in this cause.

(Signed) EDWARD C. BILLINGS, *Judge.*

Motion to Appoint Master. Entered and Filed 29th January, 1885.

U. S. Circuit Court, Eastern District of La. In Equity.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

On motion of counsel for complainant and defendant, and on suggesting to the court that in accordance with the agreement made part of this motion:

It is ordered that the order herein rendered appointing A. G. Brice, Esqr., examiner be amended and enlarged by appointing him
39 as examiner and master herein, and to make a report in accordance with law and practice of this hon. court.

(Signed) EDWARD C. BILLINGS, *Judge.*

U. S. Circuit Court, Eastern District of Louisiana.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

It is hereby agreed that the order rendered in this case appointing A. G. Brice, Esq., examiner be amended and enlarged by appointing him examiner and master, and that as such he make a report in accordance with law and practice of this hon. court.

(Siged) BRAUGHN, BUCK & DINKELSPIEL,
For Def't.

(Signed) CH'S LOUQUE & A. VOORHIES,
For Pl'ff.

Decree. Entered and Filed January 30th, 1885.

United States Circuit Court.

R. VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

Upon motion of solicitors for the defendant, and the court considering the decree herein entered on January 22d, 1885, allowing the complainant an injunction as prayed for upon his furnishing bond in the manner and form set forth in said decree, and it appearing that said bond has not yet been furnished, the court doth
40 hereby order that the execution of said decree be referred to A. G. Brice, master, for the purpose of calling upon said complainant for said bond, examining, rejecting, or approving the sureties thereon if given, and the performance of such other duties thereunder as may be necessary.

Said master shall report to the court at the expiration of the time mentioned in said decree, unless same be extended by the defendant, whether or not said bond be furnished, and whether or not the sureties thereon have justified themselves according to law.

Should said bond be furnished with proper sureties, the clerk of this court will issue the injunction as prayed for upon the order of the master.

Should said bond not be furnished, or if the sureties thereon fail to justify, the court will dismiss the prayer for the injunction as originally ordered.

Jan'y 30th, 1885.

(Signed) EDWARD C. BILLINGS, *Judge.*

Report. Filed April 17th, 1885.

U. S. Circuit Court, E. Dist. of La.

RICHARD VITERBO *vs.* SAM'L FRIEDLANDER. } No. 10667.

To the hon. the judges of the U. S. circuit court in and for the eastern district of Louisiana.

In pursuance of an order of this hon. court made Jan'y 23d, 1885, and amended Jan'y 27th, 1885, I, the subscribed, one of
41 the masters of this hon. court, after due proceedings had, find and do now report:

On the 27th of October, 1883, the complainant leased from defendant a certain sugar plantation, situate in the parish of St. Charles, La., known as the Friedlander plantation, for the period of five years, together with all the buildings, outhouses, fences, sugar houses, etc., as described in the lease, at an annual rental of $5,000.00. In addition to the lands and improvements so leased, the lessor declared "that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field;" and to reimburse said lessor for said cane crop the lessee binds himself "to leave on said plantation, for the use and benefit of the lessor, at the termination of the lease, eighty-five (85) acres of seed cane thoroughly cultivated and windrowed; also two hundred (200) acres of stubble cane properly protected in lieu of the like number of acres of stubble cane on the place at the date of the lease." The "lessor further leaves with the lessee, and for the use and benefit of the plantation, implements of husbandry used for cultivation valued at $500, thirty-four mules, valued at $3,700, and a quantity of hay and cord-wood, all of which are to be returned in kind, or their equivalent, at the expiration of the lease."

In March, 1884, a crevasse occurred upon what is known as the Davis plantation, the back waters from which crevasse overflowed a large portion of the Friedlander plantation, especially that portion used for cultivation, and it was under water for several months.

The damage caused by this overflow I find from the evidence to be as follows:

The lessee lost, by reason of said overflow, the entire crop of sugar cane of 1884; that is, the 200 acres of stubble cane and the
42 85 acres of plant cane were destroyed; the ditches were partially, and in some places entirely, filled; the canals, espe-

cially the one dug by the lessee, were partially filled and the bridges generally swept away; the water remained over the land until July, 1884; a deposit was left over the land of from 3 inches to 6 inches. To cultivate the land as a sugar plantation the following year (1885) it would require ditches to be redug, the canals to be opened or cleaned out, the bridges replaced, and seed cane to be obtained and planted—all at considerable expense—to put the plantation in the condition it was at date of the crevasse.

The lessee on entering upon the lease, according to the evidence, found the ditches in a bad condition and no canal into which to drain the fields, except one on the lower side of the plantation. In order to prepare the ground for cultivation of sugar cane he decided that a more perfect system of drainage was necessary and he caused a canal to be dug through the centre of the plantation from the front to the swamp and enlarged and deepened the ditches, securing thereby a better system of drainage.

The complainant states that this destruction occurred without any fault, negligence, or carelessness on his part, but by an extraordinary and unforeseen event.

The question for determination is, whether the plantation leased was totally destroyed, or if the destruction, as in this instance, of the growing crop of sugar cane, the partial filling of the canals and ditches, and the washing away of the bridges is a destruction of the thing leased entitling complainant to a dissolution of the contract?

The thing leased was a sugar plantation; that is, land, buildings, and improvements thereon. It is admitted that the land, buildings, and improvements thereon were not destroyed; they are
43 still intact.

The Civil Code, art. 2743, gives the lessee of predial estates the right to claim abatement of the rent where extraordinary accidents occur that could not have been foreseen at the time of the making of the contract. When such a destruction takes place the damage must be ½ of the value of the entire crop to entitle the lessee to relief. In such cases the lessee has no option; he may demand abatement of the rent, but not dissolution of the lease.

In the case of Vinson *vs.* Graves, 16th A, 162, the court expressly refused to grant relief to the tenant, although his crop was totally destroyed. One of the distinguished counsel for complainant in this case was a member of the court that decided the Vinson-Graves case, and as there was no dissenting opinion I infer he concurred in the opinion of the court in that case.

The rule laid down in that case was that an overflow of the Mississippi river was not an extraordinary accident, entitling the tenant to abatement of rent under art. 2743 of the Civil Code.

If the articles 2697 and 2699 apply to predial estates, was the overflow of the Friedlander plantation a fortuitous, unforeseen event? It was admitted in the Vinson-Graves case the entire plantation was under water during the year 1858, and for that year ceased to be fit for the purposes for which it was leased; the use of it was therefore seriously impeded.

The same principle laid down in the Vinson-Graves case was reaffirmed in the case of Masson *vs.* Murry *et als.*, 21 A, 535.

It appears now settled that a party seeking to give an inundation by reason of overflow from the river the character of "an extraordinary accident" must show that it was unusual and unforeseen, one to which the country was not originally subjected.

In the case of Vinson-Graves the court says: "The over-
44 flow of the Mississippi river is of such frequent occurrence that it cannot be regarded as belonging to that class of extraordinary and unforeseen accidents which entitle the tenant of a predial estate to an abatement of the rent. Indeed, the overflows of this river are so frequent that a system of levees has been constructed under the authority of the State for the purpose of preventing the annual inundation of its bank; and so frequent have the waters of this river made breaches in the levees that even a crevasse itself cannot be considered as an extraordinary accident in the sense of art. 2714 of the Civil Code, and as such entitle the tenant of a predial estate to a reduction of the stipulated rent, although such crevasse should be the means of overflowing the land by the tenant, and thereby destroying a part of the whole of his crop." This applies to the lands along the whole length—not to some particular parts where crevasses had already occurred.

On examination of the contract between complainant and defendant I find it is twofold.

1st. It is the lease of the land in the parish of St. Charles owned by the defendant and known as the "Friedlander plantation" buildings, outhouses, appurtenances, sugar house, etc.

2d. A contract of giving in exchange to the lessee by the lessor all of the growing crop of cane of 1883 standing in the field as seed cane, 30 loads of cured hay, 185 cords of wood, the use of thirty-four mules, and $500.00 worth of tools and implements used on the plantation, all of which are to be returned in kind, or their equivalent, at the expiration of the lease on Dec. 15th, 1888.

The contract exchange is governed by art. 2660, Civil Code.
45 After delivery of the hay, wood, and tools to the lessee, they were at his risk; and, if lost by fire or other event, could he plead the loss in bar of the lessor's demands to return the same in kind, or their equivalent, at the expiration of the lease?

Under the law of obligations and rights of the lessor we find the resolutory conditions specified.

Art. 2692, Civil Code, binds the lessor:

1st. "To deliver the thing leased to the lessee."

2nd. "To maintain the thing in the condition such as to serve for the use for which it is hired."

3rd. "To cause the lessee to be in peaceable possession of the thing during the continuance of the lease."

Art. 2710, Civil Code, says:

1st. "The lessee has the right to enjoy the thing leased as a good

administrator according to the use for which it was intended by the lease."

2nd. To pay the rent as agreed on.

These articles of the Civil Code are in harmony with the rules of the common law relative to the rights of the landlord and tenant.

Warranty is one of the obligations of the landlord, but the warranty is that no person claiming through or under him, or having superior title to him, shall disturb the lessee in his quiet enjoyment and use of the premises leased. C. Code, art. 2500 *et seq.* Story, sec. 906.

The liability of the lessee to pay rent:

1st. Depends on his being put into possession of or afforded the opportunity or power to take possession of the premises.

2d. Being secured in his quiet possession against all but wrong doers; and

3d. The lessee is bound to pay the rent, although he have
46 no beneficial use or enjoyment of the thing leased unless the lessor has been guilty of some fraud, concealment, or misrepresentation.

Story, sects. 931, 931*b*, 937, and A 937.

This is the English law, and equity gives no relief in such cases.

The same rule is laid down in "Bishop on Contracts," sect. 617: *qui sentit commodum sentire debet et onus.*

The allegation that the plantation was destroyed by no fault of the complainant, but by "an unforeseen and disastrous rise in the river" is but invoking the maxim: *Actus Dei nemini facit injuriam.*

The common law interpretation and application of this maxim, as between landlord and tenant, give the tenant no relief in case of this kind.

The act of God (Broom in his legal Maxims Marg., p. 211) defines any inevitable accident occurring without the intervention of man, and considered to mean something in opposition to the act of man, "which no industry can avoid or policy prevent."

And he cites a case where land was demised to a tenant, and pending the lease a part of the land demised was overflowed by the sea, and so remained permanently.

Relief was granted because the land was a total loss.

It will appear from the context the land itself must be destroyed and not the growing crop lost by reason of the overflow.

In the case of Izon *vs.* Gorton, 7 Scott, p. 537; 3 Woodbury & Minot, U. S. C. R., 82: The defendant was tenant from year to year; the upper floors of the warehouse were destroyed by an accidental fire in the middle of the quarter; and the building rendered untenatable until rebuilt, about seven months afterwards. It
47 was held the relation of landlord and tenant was not determined, and defendant was held liable for the rent.

The law between the lessor and lessee of houses or lands has been strictly construed, and to protect the tenant from accidents that can be foreseen, such as fire, overflow by crevasses on the Mississippi river, he must make proper stipulations in the contract.

"Broom's Legal Maxims," 698.

It is claimed by the lessee that articles 2697, 2699, and 2728 of the Civil Code give the right to have the lease dissolved in such a case as here presented. It is pertinent therefore to consider the question with reference to these articles more specifically. The thing leased was a tract of land situate in St. Charles parish, a sugar plantation, with the buildings and appurtenances thereto belonging. The thing destroyed was the growing crop. The growing crop was not leased.

By Art. 2728, Civil Code, it is the loss of the thing leased that entitles the lessee to have the contract of lease dissolved.

Loss means destruction, and in this sense it would be the destruction of the thing leased or ruined so so as to render it totally unfit for the purposes for which it was leased.

In the words of Art. 2697 of the Code the thing must be totally destroyed.

It cannot be said that the thing leased in this case has been totally destroyed or even partially destroyed.

Art. 2699, Civil Code, says that if without any fault of the lessor the thing ceases to be fit for the purposes for which it was leased * * * the lessee may obtain the annullment of the lease.

The plantation was overflowed. Is the land unfit for the
48 use for which it was leased by reason of this overflow?

The complainant admits the plantation would grow a crop of cane, but it would require a considerable sum of money and labor to put it in good condition for the growing of cane; that is, it would require seed cane, the canals and ditches to be dug out, and bridges rebuilt.

This work is an incident to the growing of a crop of sugar-cane annually. Some years it may require more seed cane, more labor to put the canals and ditches in order than in others.

The land therefore has not ceased to be fit for the purposes for which it was leased; on the contrary, some of the witnesses suggest that the deposit has enriched and greatly benefitted the land. If it is clear the Friedlander plantation has not ceased to be fit for the purposes for which it was leased no relief could be granted to complainant under art. 2699, Civil Code, nor under art. 2697, Civil Code, for the thing has not been totally destroyed by an unforeseen event, nor has it ceased to be fit for the purposes for which it was leased.

Under art. 2697 the thing must be totally destroyed. If it is assumed a sugar plantation consists of the growing crop, the seed cane, the ditches, canals, bridges, houses, etc., destruction has only been partial and not total. In case of partial destruction, can relief be granted under art. 2697 of Civil Code? Some parts may be destroyed of a thing; in that case it is destroyed in part only. If destroyed in part only, or if destroyed in such a manner as to give the complainant relief, it must be destruction by some "event unforeseen."

The Supreme Court, in the case of Vinson-Graves, 16 A, 162, already cited, declared that overflows were not unforeseen events;
49 on the contrary, they declared that overflows cannot be re-

garded as belonging to that class of extraordinary and "unforeseen accidents."

Art. 2743, Civil Code, uses the phrase "that unless those accidents be of such extraordinary nature that they cannot be foreseen," and the corresponding art. in Code Nap., for the term "cannot have been foreseen," uses the words "*par des cas fortuits.*" The Vinson-Graves case defines the legal significance and force of these words: and that a crevasse on the Mississippi river cannot be considered an "unforeseen event"—*cas fortuit.*

The thing leased, therefore, was not destroyed by an "unforeseen event"—*par des cas fortuits.*

Art. 2697 gives the lessee the right to demand a dissolution of the lease or a diminution of the price. If he could not have a diminution of the price, because the thing was not destroyed by an "unforeseen event," *a fortiori*, he could not have a revocation of the lease, for the greater includes the less. It follows relief cannot be obtained by the complainant under arts. 2697, 2699, and 2728, Civil Code.

Art. 2743 says: "That a tenant of a predial estate" (and a sugar plantation is a predial estate) "cannot claim abatement of the rent under the plea that during the lease either the whole or part of his crop has been destroyed by accidents, unless those accidents be of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made;" and under this art. the loss must be equal to the value of one-half of the crop, and the accident must be of such an extraordinary nature that it could not have been "foreseen." Was the destruction of the crop by the crevasse an accident of such an extraordinary nature as to be unforeseen? This is answered in the negative by the Vinson-Graves case.

It will be seen, by both the common and civil law, that dissolution of the contract of lease is not favored and is not allowed, unless the case comes clearly within the law as laid down.

In the case of Dussnau *vs.* Generis, 6 A., 279, the Supreme Court says: "The consideration of the provisions of our Civil Code on the subject of letting and hiring, with reference to their general spirit and intendment, leads us to the conclusion that the law-givers did not contemplate the dissolution of leases except in extreme cases, and in this respect it harmonizes with the spirit of the Roman law and that of France." In this case ingress and egress *was* much impeded by reason of the crevasse that occurred at Bonnet Carre, inundating a portion of the rear of this city. The water covered the pavement in front of the house occupied by defendant. It rose into the alleyway and nearly reached the yard, which was the means of communication between the street and back buildings of the premises. The Supreme Court refused to annull the lease, and compelled the tenant to pay the rent for the residue of the term. In this case defendant had removed his furniture and abandoned the house in May.

The same principle is laid down in the case of Denman *vs.* Lopez, 12 A., 823.

I therefore find in this case and do report—

1st. That the property leased was not destroyed.

2nd. That the loss of the growing crop, the partial filling of the canals and ditches, and the washing away of the bridges was not caused by an "unforeseen event."

3rd. That the plantation is as suitable for cultivation as a
51 sugar plantation, if not better, than it was prior to the overflow, and that the clearing of the canals and ditches and repairing of the bridges [were] incidents necessary to the cultivation of a sugar plantation.

4th. That equity can give no relief to complainant and that his bill should be dismissed with costs.

All of which is respectfully submitted.

New Orleans, April 15, 1885.

(Signed) A. G. BRICE, *Master.*

The fee of the master is referred to the court.

Testimony filed with master's report.

United States Circuit Court, Eastern Dist. of La. In Equity.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

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For Complainant.	Direct.	Cross.	Red.	Recross.
G. Lussan	1	33	70	74
J. A. Segur	77	90	102	108
D. Halphen	110	123	146	162
L. Viterbo	171	175	179	180
N. Louque	181	190	207	209
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52 L. Viterbo	407			

For Defendants.	Direct.	Cross.	Red.	Recross.
Jules Brow	229	247		
D. R. Perret	249	256	262	
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United States Circuit Court, Eastern District of Louisiana.

RICHARD VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

Testimony taken before A. G. Brice, Esq., examiner, at his office, No. 122 Gravier St., in [the] city of New Orleans, on the 28th day of Jan'y, 1885.

For complainant, Albert Voorhies & Chas. Louque, Esqs.

For defendant, Messrs. Braughn, Buck & Dinkelspiel.

Index. G. Lussan. P. —.

53 GURBLAINE LUSSAN sworn for complainants.

Direct examination by Mr. LOUQUE:

Q. Where do you reside?
A. I reside in the parish of St. Charles.
Q. On what side of the river—the right or left?
A. On the right bank.
Q. Do you live at any distance from the Friedlander plantation?
A. I live on the next place.
Q. Do you know anything in relation to the Davis crevasse?
A. Yes, sir.
Q. Please state in what condition the plantation was just previous to the Davis crevasse.
A. The plantation was in cane.
Q. Was it under full cultivation?
A. Some part of it was not cultivated right before and around the sugar house.
Q. How many arpents of cane was under cultivation on that plantation at the time of the crevassee?
A. About 160 or 170 acres of plant cane.
Q. How many acres of stubble cane was there on the plantation at the time of the crevasse?
A. There was about 90 acres, more or less, according to my judgment.
Q. How do you know these facts that you have just testified to, relative to the amount of cane?
A. Mr. Viterbo made arrangements to rent the place and I went all over it. I was on the place next to it.

54 Q. Please state what was the effect of the crevasse on that plantation (Friedlander plantation), and at what time the crevasse took place.
A. I cannot remember the exact date.
Q. In what month was it?
A. I know I was called at 4 o'clock in the morning, but I do not remember the day or month.
Q. What time in the year was it—was it in the summer, spring, autumn, or winter?
A. In the spring; I believe in March or April.
Q. Was any cane growing at the time?
A. Yes, sir; the cane was that high (about a foot); that was the plant cane, and the stubble cane was up already.
Q. Well, when did the crevasse break?
A. In April the crevasse broke.
Q. How much water was there on that place?
A. Some places 4 or five feet and some places three feet.
Q. What was the least depth?
A. At the sugar house, between it and the river, it was only two feet about.
Q. That was the least depth on the place?
A. In front of the sugar house on the railroad (Morgan R. R.) the

ground is high and then slants down towards the swamp; there was no water right next to the railroad.

Q. How far is the railroad in front of the sugar house?

A. The railroad is about 8 acres from the river and right in front — sugar house.

Q. You mean the water of the crevasse was in about eight acres of the river?

55 A. Yes, sir.

Q. Was there any water at the sugar house?

A. At the sugar house there was about two feet of water.

Q. Going back from the sugar house was there any water?

A. After going back from the sugar house the water increased in depth.

Q. All the balance of the place behind the sugar house was covered?

A. Yes, sir; every place except a cut at the railroad of about 5 or 6 acres.

Q. Is that all the land that was not covered by water?

A. The quarters were not covered.

Q. What do you call the quarters?

A. Where the stables and the mills are.

Q. Is that where the negroes live?

A. The quarters is where the stock was kept and where the hands lived, all about 12 acres; there was a cut below the railroad that was not under water.

Q. Was there any land under cultivation that was not under water?

A. There was only one cut not under water.

Q. I asked you if there was any land in cultivation that was not under water?

A. No, sir.

Q. Was there any cane under cultivation that was not under water?

A. Not a stick of cane.

Q. How many quarters are there on that place?

A. Two.

Q. Was any one of them under water?

56 A. One was under water about two feet.

Q. How many cabins did you have all told on that place?

A. I cannot tell you how many in front, but behind there is eight new ones; those in front [of] sugar house I never counted.

Q. How long did the water remain on the place?

A. I think the water commenced to go down in May—in latter part.

Q. How long did it remain on the place?

A. It remained on the place about three months.

Q. When the water left the place was there any of the plant cane or anything that was cultivated that could have kept on growing?

A. No, sir; all was killed.

Q. What was the effect of the crevasse as regards the cultivation of the place?

A. It destroyed all the crop, and left the place in such a bad way that it could not be cultivated this year, as the ditches are all filled up.

Q. Filled up with what?

A. Deposit of sand.

Q. What would be necessary in order to cultivate this place in a crop of cane this year?

A. It would have to be ditched from one end to the other.

Q. What else; is that all?

A. No; you would have to buy seed cane, make new bridges, as they were all destroyed; there is not one bridge on the place.

Q. How many bridges does it require on that place?

A. I cannot tell you exactly—a good many.

Q. About how many?

57 A. There is no less than 15 or 16 bridges.

Q. How many cuts are there from the front to the rear of that plantation?

A. I think about 15, at the least; maybe more.

Q. What is a cut?

A. A cut is the land between the cross ditches; the cross ditches are those running parallel with the river.

Q. How is the slant of the land on that plantation?

A. From the river to the swamp.

Q. How many canals is there on that plantation from the river to the swamp?

A. They have two canals on the place.

Q. You have two canals running from the river to the swamp?

A. Yes, sir.

Q. There are fifteen cuts from the river to the swamp and two canals?

A. Yes, sir.

Q. Are there not bridges on the canals?

A. Bridges only on one canal.

Q. How do you cross over the other canal?

A. It is on the line between the plantations.

Q. So there are fifteen main bridges on the place?

A. Yes, sir.

Q. How many bridges are there on the cross canals?

A. I know there is six through the main roads.

Q. 15 and 6 makes 21 bridges on the place?

A. Yes, sir; I am counting only the main bridges; there is some more bridges on the little canals and on the main roads; there are some bridges over the 5-feet ditches also.

Q. How much does it cost to make one of those main

58 bridges and how wide are the canals?

A. The canals commence at about 6 feet and get to 20 feet wide. The canal commencing at the sugar-house is 6 feet wide and gets wider as it goes back.

Q. How much would it cost to build one of those main bridges where the canal is ten feet wide?

A. You can buy the lumber there at not less than $20 to $25 per the bridge.

Q. Where the canal is 20 feet wide the cost is more than for where it is 10 feet wide for a bridge?

A. Yes, sir; a man has to buy the cross pieces besides the other lumber.

Q. What has become of those two main canals?

A. Some parts of them is filled up with sand, and in some parts they are filled up more or less.

Q. Are they filled up completely with sand?

A. Not quite to the top, but pretty well full.

Q. Have you any idea what it would cost to dig out those canals again?

Objection. Mr. Buck, att'y for defendant, objects to the question on the ground that no testimony should be allowed in this investigation going to show particular damage or particular injury to special improvements of parts of this plantation, except in so far as the same may tend to the main and one issue left in this case; that is, whether or not the plantation has been materially destroyed and rendered unfit for the purposes it was leased for, as laid down in the Civil Code, and he also objects to any question as to the cost or value of damages in dollars and cents as entirely irrelevant to the pleadings in this case.

Ruling: Objection sustained.

59 Att'y for complainant reserves a bill to the ruling.

Q. How many acres were under cultivation on that plantation from the river to the swamps?

A. I cannot tell you exactly, but about 40 acres deep.

Q. How many acres wide is the plantation?

A. I think seven acres wide by about 40 acres deep.

Q. How far apart are the cross ditches?

A. Some 3 acres, some 4 acres, some 2½ acres. I judge that by the eye.

Q. Have you any ditches between the two canals besides the cross ditches?

A. Yes, sir; plenty; one every ½ acre.

Q. You say all these ditches and canals are filled up and practically useless?

A. Some are filled up more or less and some filled up altogether with sand.

Q. In the condition this plantation is to-day, can you cultivate anything on it?

A. You can make rice; that is the only thing you can cultivate without ditches.

Q. What would you call this plantation to-day?

A. I would call it a plantation to make rice.

Q. Would you call it a sugar plantation?

A. You could not make sugar on it this year; it would have to be put in order and be ditched.

Q. You cannot raise sugar on it in the condition it is now?
A. No, sir.
Q. How far was the crevasse from that plantation?
A. After the next plantation, which is the Lone Star plantation, which is about 20 acres wide, then came the crevasse.
60 Q. It was about a mile?
A. Yes, it was about a mile; pretty near a mile.
Q. What did Mr. Viterbo do to prevent that crevasse?
A. He furnished a hundred hands; we were there when the break occurred.
Q. How long did the hands work there to try and stop the crevasse?
A. Three weeks; until railroads took charge.
Q. Mr. Viterbo had hands at the crevasse all the time the Morgan R. R. worked at the crevasse?
A. Yes, sir; until they went to work with the pile-drivers.
Q. He had his hands working there for some time?
A. Yes; and when the 2 R. R's took the job he had his hands filling sacks.
Q. After they found out they could not prevent the crevasse, what did Mr. Viterbo do?
A. We got a lot of sack and lumber and tried to stop the water from coming on the plantation by working on the levee on the side of the plantation, but it broke up by the sugar house and let the water in.
Q. How many hands did you have working on that side levee?
A. We had about 125 hands working there; maybe 150 hands.
Q. Mr. Viterbo had 150 hands working there?
A. Yes, sir; and his hands were working all the time, and I went with my hands from the Edmee plantation.
Q. What do you call the Edmee plantation?
A. Mr. Viterbo's plantation.
Q. What do you mean by your hands?
A. I mean by my hands the hands I work on my plantation and not on the Friedlander plantation.
61 Q. Well, what was the result of his work? Did he succeed in stopping the water?
A. No, sir.
Q. At what time did he abandon working on the place?
A. In May, some time.
Q. Do you know what was the cause of the Davis crevasse?
A. I cannot tell you—there was a rice flume broke that was about 15 feet when got there at 4 o'clock in the morning.
Q. Did Mr. Viterbo have anything to do with the Davis levee before the crevasse?
A. No, sir; he had nothing to do with it.
Q. Who was in charge of the Davis levee?
A. Mr. Dugasson's plantation was there in front of the crevasse.
Q. Mr. Viterbo had nothing to do with that levee before it broke?
A. No, sir.

Cross-examination by Mr. BUCK, att'y for defendant:

Q. You say you own the plantation adjoining the Friedlander plantation?

A. I work it; I don't own it.

Q. Who owns that plantation?

A. It is Mr. Viterbo's plantation, called the Edmee.

Q. Then when you speak of the adjoining plantation you mean the Edmee plantation, which is worked for the benefit of Mr. Viterbo and of which you are manager?

A. Yes, sir.

Q. You are employed by Mr. Viterbo?

A. Yes, sir.

Q. Does Mr. Viterbo own the Edmee plantation?

62 A. I believe he owns the plantation.

Q. Who manages or cultivates the Friedlander plantation?

A. He had a manager then.

Q. Who was the manager?

A. Mr. Halphen.

Q. The Edmee plantation is also a sugar plantation, is it not?

A. Yes, sir.

Q. On what side of the Friedlander plantation does the Edmee plantation drain into the swamp?

A. The Edmee plantation adjoins the Friedlander plantation on the upper side.

Q. The Edmee and Friedlander plantations front on the river, do they not?

A. Yes, sir.

Q. Where was the Davis crevasse relative to these two plantations, above or below?

A. Below them.

Q. How far below the Friedlander plantation was the Davis crevasse?

A. Between a mile and three quarters of a mile.

Q. Was it a mile or was it $\frac{3}{4}$ of a mile?

A. It was between $\frac{3}{4}$ of a mile and one mile.

Q. The Friedlander plantation was overflowed by back water from the Davis crevasse, was it not?

A. Sideways and back water. The levee on the side to the crevasse broke at the sugar house of the Friedlander plantation and ran to the lower part and filled up the place with water.

Q. Was the Edmee plantation under cultivation at the same time?

A. Yes, sir.

Q. As a sugar plantation?

63 A. Yes, sir.

Q. Was it overflowed?

A. A great portion of it was overflowed back of the levee in the middle; on the other side of the levee it was not overflowed; the water did not get through the levee in the middle onto the other side.

Q. How much of the Edmee plantation do you say was overflowed?

A. The back portion.

Q. What do you call the back portion?

[A.] There is a levee across the field in about the middle of the plantation.

Q. Then the Edmee plantation and the Friedlander plantation are divided by a levee that ran back from the river?

A. Yes, sir.

Q. How far back did that levee extend?

A. Between 35 and 40 acres in depth.

Q. What is the total depth of the Edmee plantation on the line of that levee—the total depth on the side of the Friedlander plantation?

A. About 45 to 50 acres in depth on that side.

Q. I understand you to say that this side levee divides the Edmee and Friedlander plantations?

A. Yes, sir.

Q. How long is that levee between the Edmee and Friedlander plantations?

A. It is 35 to 40 acres long from the river.

Q. How long on that side is the Edmee plantation, including the woods and everything?

A. It runs back clear to a little lake.

64 Q. About how many acres?

A. It is about 6 miles from the river to that lake.

Q. The Edmee plantation is about 6 miles in depth?

A. Yes, sir; about that.

Q. How far beyond the end of this levee does the cultivated part of the Edmee plantation go?

A. About 4½ to 5½ acres.

Q. How many acres of the Edmee plantation under cultivation was under overflow?

A. About 200 acres, below the levee, that was planted in cane.

Q. That was in cane, you say?

A. Yes, sir; planted in sugar cane.

Q. Those 200 acres were actually under cultivation at the time of the crevasse?

A. Yes, sir; inside of the side levee.

Q. Is any portion of these 200 acres that were under overflow under cultivation now at present?

A. Not yet; I am plowing some of it now in front of the Morgan railroad.

Q. You contemplate putting it in cultivation this year?

A. Yes, sir; I am ditching it now.

Objection: Judge VOORHIES, counsel for complainants, objects to any evidence as to the cultivation and present condition of the Edmee plantation, on the ground that it — foreign to the issue in this case and inadmissible.

Note: Mr. BUCK, counsel for defendant, claims that he is cross-examining the witness, and under the laws of evidence he has the right to question the witness on that point.

Ruling: Objection overruled.

65 Reservation: Judge VOORHIES reserves his right to a bill.

Q. How deep was the water on the Edmee plantation where it was under water?

A. In the field under water it was in some places on the ridges 2 feet, and in other places, not on the ridges, about 3 to five (5) feet.

Q. So much of the Edmee plantation that was under water was just as effectually overflowed as the Friedlander plantation was overflowed?

A. Yes, sir; except on some hills the water was not so deep.

Q. Some hills; what do you mean by that; are there any hills on the plantation?

A. Some cuts.

Q. You mean levees?

A. Some ground is new land just cleared and has ridges on it.

Q. Artificial ridges, you mean?

A. Yes, sir.

Q. Ridges and levees, but not natural ground, but artificial?

A. Yes, sir; it is not natural ground.

Q. How long have you been engaged in planting sugar cane in this State?

A. Since 1866.

Q. Have you ever cultivated any plantation of your own in cane?

A. No, sir.

Q. As a matter of business, what is the present condition of the sugar planting interest in Louisiana; is it lucrative, or otherwise?

A. I don't know; I am not well acquainted with the sugar

66 market.

Q. Is it not a fact that the planting of sugar cane is not as profitable in the State of Louisiana as it was a few years ago?

A. There was a time when sugar brought from 10 to 12 cents per pound.

Q. How much is it worth now per pound?

A. Some for 5½–5½, and some only brings 4½ cents per pound.

Q. That is what the planters get?

A. Yes, sir.

Q. What did planters get for sugar per pound three or four years ago?

A. From 7 to 8 cents.

Q. What did they get two years ago?

A. I do not remember.

Q. Is it not a fact that after a plantation has been cultivated for a year and the crop harvested that the land has to be reditched, graded, and prepared before a new crop is planted, whether there has been an overflow or not?

A. Not every year.

Q. Is it not necessary to dig out the ditches and prepare a plantation for the proper drainage every year before a new crop is put in the ground?

A. Not all the plantation.

Q. Not all the plantation?
A. No, sir.
Q. Some of it?
A. Yes, sir.
Q. How much of it?
A. Well, when you plant cane; every 3 years.
67 Q. You dig out the ditches every three years.
A. Yes, sir; the same ditches that were there before.
Q. Suppose you were to plant sugar cane now on a plantation for the crop of 1885; what would you do?
A. I would dig out the ditches and clean up the land.
Q. What would you then do?
A. I would plant the cane and see that the ditches are all good and the drainage good.
Q. The ditches you dig out this year would you dig them out next year?
A. No, sir; the ones I dig out this year I would do nothing to except cleaning out the grass in them.
Q. You would not dig them any deeper?
A. No, sir; I would take the grass out. I call digging when you take a spade.
Q. What is the effect of an overflow on the soil of a plantation in regard to productiveness; is it injurious or is it an improvement to the land?
A. It depends how the deposit is made, and how much of it.
Q. The extent of the effect depends on how much is deposited—is the effect good or bad?
A. Good. I mean when there is a deposit.
Q. Was there any deposit left on this plantation (Friedlander's) by this overflow?
A. Yes, sir.
Q. How much of it?
A. Some places it was less and in others more.
Q. About how much deposit was left in inches?
A. About five or six inches, more or less.
68 Q. Was that the greatest depth of the deposit?
A. In some places it was as deep as eight inches.
Q. What is the depth of the ordinary ditches?
A. Three feet.
Q. Have you a ditch of that kind between every cut you have stated?
A. Yes, sir; they are bound to be three feet, more or less—generally 3 feet.
Q. What is the depth of the canals?
A. In some places five or six feet, and in some places eight feet deep by twenty feet.
Q. Twenty feet wide?
A. Yes, sir.
Q. What is the width of the two canals?
A. They look to me about 20 feet wide, more or less.
Q. What is the width of the ditches you say are three feet deep?

A. About 3 feet wide; more than that; they are from five to six feet; the cross ditches are larger than the leading ditches.

Q. Which are the cross ditches?

A. Those that divide the cuts and run parallel with the river.

Q. Where are the two canals?

A. One is on the lower line.

Q. What do you mean by the lower line?

A. Below; on the lower line of the Friedlander plantation.

Q. Where is the other canal?

A. In the center of the plantation.

Q. Does any canal divide the Friedlander plantation from the Edmee plantation?

A. No, sir; only a ditch.

69 Q. How many leading ditches are there running parallel with the canals?

A. One to every ½ acre.

Q. What was your reason for stating that this plantation was only fit for a rice plantation?

A. Because it has to be ditched, and because you cannot get the water out without ditches.

Q. What is the depth of those ditches now?

A. Some are filled up altogether.

Q. How about the canals?

A. All nearly filled up; some places clean full.

Q. How full are they?

A. Well, I can't say; they are filled up more or less.

Q. The only reason why the Friedlander plantation cannot be cultivated as a sugar plantation is that it would have to be ditched and canaled?

A. Yes, sir.

Q. The drainage would have to be restored?

A. Yes, sir.

Q. By going through the ditches?

A. Yes, sir; in the ditches to the swamp.

Q. Did you have charge of Edmee plantation at the time Mr. Viterbo took possession of the Friedlander plantation?

A. Yes, sir.

Q. You know that the stubble cane and seed cane on the Friedlander plantation was cultivated in the year commencing in 1884 for the purpose of getting a crop for 1884?

A. It was cultivated; but I don't know what the intention of Mr. Viterbo was about that.

70 Q. Mr. Viterbo took possession in December, 1883?

A. I do not remember.

Q. Had Mr. Viterbo planted a crop of sugar cane on the Friedlander plantation at the time of the overflow?

A. Yes, sir.

Q. That crop was the offspring or produced from the stubble cane which Mr. Friedlander left on the plantation when Mr. Viterbo took possession?

A. Yes, sir.

Q. Did Mr. Viterbo plant any of that stubble anywhere else?
A. No, sir.
Q. Did he take any to the Edmee plantation?
A. No, sir.
Q. Was there a stand of that crop in good growing condition at the time of the overflow?
A. Yes, sir; in some places one foot high, and in some places sprouting. It was all up out of the ground.
Q. If that crop had been matured and harvested, what would have been necessary for the purpose of replanting for the year 1885 another sugar crop on the same ground?
A. It would not be planted on the same ground, but on the ground next to it.
Q. You cannot plant in the same ground two successive years?
A. No, sir; you don't want to do that, because the stubble is already there.
Q. What is necessary to raise another crop of cane on the very spot and on the very ground on which you have just harvested a crop?
A. On the same spot you planted cane last year the stubble comes up this year.
71 Q. You plant new cane, do you not?
A. You don't plant new cane on the same ground; the stubble cane comes up for 2 and 3 years.
Q. What do you do to plant a crop of cane in new ground?
A. You plant the stubble, and that is good for two or three years; some people plant corn and cow peas in the cane. After you have used the stubble for two or three years you plant the field in corn and cow peas; that is to rest the ground; and then the next year you plant the plant cane in the cow peas and corn.
Q. How long has Mr. Viterbo been on the Edmee plantation?
A. Three years.
Q. He was there the year before he leased the Friedlander plantation?
A. Yes, sir; he has took in three crops.
Q. The one you are preparing for now will be the fourth crop?
A. Yes, sir.
Q. What is the reason why cane cannot be planted in the same ground the succeeding year after three crops have been made?
A. There is no reason at all why cane cannot be planted originally in the field after three crops have been taken off it; it is not generally done because it was[tes] the land and makes it barren.
Q. On a sugar plantation in constant use do you put the same land in cultivation for sugar every year?
A. No, sir; not generally; some planters do it, but they use manure or fertilizers on the ground.
Q. Once you have planted a plantation in cane or a piece of ground in cane, how many years does it remain planted with cane?
A. Two years stubble and one year cane.
Q. What do you do with the land after that?
72 A. Some plant in corn and some in corn and cow peas.

Q. How long?
A. One year.
Q. They give the land a rest?
A. Yes, sir; some do, and some use fertilizers and manure, and some plant in corn and some in cow peas, and leave the land for a year, and the next year plant cane.

Redirect examination by Mr. LOUQUE:

Q. Will you give us the estimate of what it would cost to dig those ditches and canals and put them in the same condition as they were before the overflow?

Objection: Mr. BUCK objects to the question on the grounds stated in his former objection (former objection read, p. —) and as being irrelevant to the issue, and also objects to the form of the question from "put them in the same condition as they were before the crevasse," on the ground that it is not necessary to put them in that condition.

Ruling: Objection overruled.

Reservation: Mr. BUCK reserves the right of a bill.

A. Between four and five thousand dollars.
Q. How long is the main canal from the river to where it stops?
A. Never measured it exactly.
Q. About how long?
A. About 80 acres.

Q. By Judge VOORHIES: How much of it is filled up?
A. From one end to the other end.

Q. By Mr. LOUQUE: After a crevasse, if you plant cane on
73 the land that is covered with a deposit of sand, can you make sugar cut of the cane?
A. The first year after a break the cane does not grow well.
Q. Do you know or not whether there are bugs which spring from that deposit and destroy the cane?
A. I cannot say; I never saw it; I have heard of it.
Q. You never saw it?
A. No, sir.

Recross-examination by Mr. BUCK:

Q. You have testified that the deposit on the land in the ditches was two feet deep; did you mean that it was two feet deep in the canals also?
A. In some places, and some places filled up.
Q. The average depth of those canals was about five to six feet?
A. Yes, sir.
Q. How much deposit was left in those canals?
A. Some places two, and some places 2½ feet, and some places filled up.
Q. In some places the canals were filled up with deposit, and in some places 2 and 2½ feet?

A. Yes, sir; in some places there was more than 2½ feet.

Q. You do not mean to say that in any one place the ditches and canals were filled up to the top?

A. The ditches, not the canals.

Q. They were filled up by mud draining into them, as all ditches are filled up?

74 A. No, sir; by crevasse sand.

Q. Have you made any estimate as to the probable cost of restoring these canals and ditches, and did you prepare your answer, or is it a simple opinion?

A. I estimate that from opinion.

Q. You have made no calculation on the subject?

A. No, sir.

JOHN A. SIGUR sworn for complainants.

Direct examination by Mr. LOUQUE:

Q. Where do you live?

A. At present I live in Iberville.

Q. Are you acquainted with the Friedlander plantation?

A. Yes, sir; I lived on the plantation next to it.

Q. Did you live on that plantation next to the Friedlander plantation in 1884?

A. I was 18 months one of the overseers of the Edmee plantation.

Q. By Judge VOORHIES: You were on the Edmee plantation during the Davis crevasse?

A. Yes, sir.

Q. How long did you remain there after the crevasse?

A. I remained until the 14th of October.

Q. By Mr. LOUQUE: You saw the crevasse after the water had withdrawn?

A. Yes, sir.

Q. What was the effect of the crevasse on that plantation as regards the cultivation of that plantation; I mean the Friedlander's?

75 A. It was completely destroyed as a sugar plantation; it had no drainage.

Q. By Judge VOORHIES: Why do you say it was destroyed as a sugar plantation?

A. Because the cultivation of cane requires drainage and without it you cannot raise cane.

Q. By Mr. LOUQUE: Has the plantation any drainage at all?

A. There is very little.

C. By Judge VOORHIES: What is the appearance of the plantation?

A. It just looks like a wild field without drainage; the water that comes from the rain remains there.

Q. What has become of the ditches?

A. Partly filled; some ditches are filled up; the lower canal is filled up.

Q. There are two canals that run to the rear of the plantation; in what condition are they?

A. The center canal is partly filled, in some places almost entirely filled; where they encountered a ridge it is filled up to the top; there are places only two and 2½ feet, and so on.

Q. You refer to both canals?

A. Yes, sir.

Q. Those canals, how do they drain now?

A. They are of no use to the planter unless they are dug out, as they do not drain the land.

Q. What amount of labor would be necessary to put those canals in the same condition they were before the crevasse?

A. ——

Objection: Mr. Buck objects to the question on the grounds
76 as stated before on page —.

Ruling: Objection overruled.

Reservation: Mr. Buck reserves his bill.

A. It would require a large amount of labor to put the plantation in fit condition to raise sugar.

Q. In order to cultivate sugar on that plantation as it is now would it not — making a new sugar plantation rather than repairing of a sugar plantation?

Objection: Mr. Buck objects to the question on the ground that it is the mere opinion of the witness and not admissible.

Ruling: Objection sustained.

Reservation: Counsel for complainant reserves a bill.

Q. Have you any idea what sort of deposit generally there is upon that plantation left by the crevasse?

A. The ground is covered with sand deposit; in some places more and some places less; where there was currents there is less; in some places it is 3 inches, some places 5 to 6 inches deep.

Q. By Mr. LOUQUE: How old are you?

A. 62 years old.

Q. How long have you been engaged in sugar planting?

A. My whole life.

Q. Have you seen the effect of crevasses on sugar plantations?

A. Yes, sir.

Q. How often?

A. Three times. Once in Point Coupee, on my plantation in Iberville, and the last crevasse.

Q. Is it necessary for the cultivation of sugar cane that you should have drainage?

A. There is no possibility of making sugar to advantage
77 unless there is drainage.

Q. How much drainage does it require?

A. You cannot have an excess of drainage for sugar cane.

Q. By Judge VOORHIES: As a minimum?

A. There must be ditches every ½ acre, and cross ditches every 4 or 5 acres, and large canals on the side lines; cane requires a great deal of water, but that water must be running water.

Q. What would be [the] effect of stagnant water on cane?

Objection: Mr. Dinkelspiel objects to the question on the ground that it is simply the opinion of the witness.

Ruling: Objection sustained.

Reservation: Complainant reserves his bill.

Q. What would it cost per foot to rebuild the canals and ditches on the Friedlander plantation?

Objection: Mr. Buck makes the same objection, as stated above, and on page —. Objection sustained.

Reservation: Complainant reserves his bill.

Q. By Mr. LOUQUE: Is there anything growing on that plantation now?

A. Nothing at all.

Q. Do you call it a plantation?

A. It is a large body of land idle now.

Q. Can you plant anything on it in its present condition?

A. I don't see how you could.

Q. Could you raise rice on it now?

A. You cannot, because you have to bring water to rice and take it out.

78 Cross-examination by Mr. BUCK:

Q. Then you differ with Mr. Lusson as to raising rice on the plantation in its present condition?

A. Yes, sir; from the very fact that rice requires water, and at the same time it must be renewed; I don't see how you could renew the water on that plantation in its present condition.

Q. If you make the ditches the water would not stay there?

A. No, sir; unless you dam them.

Q. Do you operate a sugar plantation of your own?

A. I have the largest sugar plantation in this State.

Q. When did you leave the Edmee plantation?

A. 14th October, last year.

Q. Was any work done on the Friedlander plantation after the crevasse?

A. No, sir; there is only weeds and grass there now, and underbrush.

Q. You say the place has nothing on it but weeds and grass?

A. Yes, sir.

Q. What is there growing on it now?

A. I don't know; I don't think there is anything.

Q. What was on the plantation last October?

A. It was covered with weeds.

Q. When did you examine the plantation with regard to the deposit and the depth of it?

A. When the water had gone down I went over the place several times.

Q. At whose request?

A. Nobody's; Mr. Lassan and myself happened to go there; we

tied our horses on the edge of the woods and went over the
79 place and saw where the deposit had taken place, and the condition of the ditches and canals; it was at nobody's request.

Q. You were there in the employ of Mr. Viterbo?

A. Yes, sir.

Q. Was not Mr. Lussan manager on the Edmee plantation?

A. Yes, sir; we were the managers.

Q. You were both on the same plantation then?

A. Yes, sir.

Q. What is the deepest deposit you found on that plantation?

A. Just beyond the Morgan R. R. I suppose there was a depth of one foot.

Q. That was on a ridge?

A. That was in the lowest place—a ridge on both sides.

Q. Did it do any damage to the plantation by filling up that low place?

A. No, sir; on contrary, benefited it.

Q. Did not the deposit benefit the ground in every respect?

A. That is a question that has never been decided upon, as the cost of putting things back and repairing the damage done is very great

Q. I asked you whether or not the deposit is beneficial to the soil as manure?

A. Of course it is; but if you foot up the expenses of raising a crop on the year after the crevasse it would be better not to have an overflow.

Q. Sugar plantations generally are liable to overflows, are they not?

A. Yes, sir.

Q. By Mr. DINKELSPIEL: How long have they been liable
80 to overflow?

A. Since the war.

Q. How often?

A. Most every year.

Q. How long is it since the Davis crevasse had its first break?

A. It broke at 3 o'clock in the morning of the 8th of March, 1884.

Q. How long has Mr. Viterbo owned the Edmee plantation?

A. Three or four years.

Q. What was the condition of that plantation when he purchased it in relation to overflow?

A. I could not answer that question.

Q. Do you remember whether it was overflowed at the time he purchased it?

A. No, sir; I do not know.

Q. By Mr. BUCK: There was no attempt made after the overflow to put this plantation (Friedlander plantation) in condition?

A. It was too late in the season.

Q. Was it too late to make an effort to prepare for the crop of 1885?

A. It could have been done in July.
Q. There was absolutely nothing done?
A. Nothing done.
Q. How long after the subsidence of the water did you first go over the plantation?
A. I cannot tell exactly the time; we just happened to be back in the field and we tied our horses and walked over the plantation, following the railroad, and looked at the ditches and canals. I several times rode to the sugar house. I helped to get a pump out of the sugar house that belonged to us and carry it away.

81 Q. What would you consider the average height the plantation was raised by the overflow?

A. Some places a foot—some places 3 inches, more or less, and there is some places you cannot perceive anything.
Q. The depth of the deposit in the ditches and canals is about the same as is on the land?
A. There is more in the ditches and canals, because the water running there more sediment descends.

Redirect examination by Mr. VOORHIES:

Q. Do you know of your own knowledge of any crevasse there prior to the Davis crevasse?
A. No, sir.
Q. How long have you resided in this portion of the State?
A. I was for about 15 months on the Edmee plantation; I was for two years in St. James, and I was in Jefferson parish, at the Stackhouse plantation, for three years.
Q. By Mr. LOUQUE: What became of the cane on the Friedlander plantation?
A. It was all killed.
Q. How high was the cane at the time of overflow?
A. At full stand.
Q. By Judge VOORHIES: You say by redigging the canals and ditches you might cultivate the Friedlander plantations as a sugar plantation; would that be all that is necessary—would you not have to have bridges and fences?
A. Yes, sir; certainly.
Q. What about cane?
A. Of course you would have to get cane.

82 Q. How could you replace the next year the 90 arpents of stubble cane and the 170 acres of plant cane?

Objection: Mr. Buck objects to the question on the ground that it is irrelevant to the issue and not admissible.

Ruling: Objection sustained.

Reservation: Complainant reserves a bill.

Q. By Mr. LOUQUE: From your experience, after an overflow has made a deposit on a plantation, what is the effect on a crop of cane or any other cereal which is planted in that ground?
A. The result is not a good one on sugar cane.

Q. Do you know anything about insects affecting the crop?

A. In Point Coupee it is imposible to raise corn or cane on account of insects right after an overflow; I tried everything to kill them without success.

Q. What is the damage done generally to a plantation in addition to the filling up of the draining canals and ditches?

A. Well, the cane is destroyed and nothing left to make a new crop; the water generally recedes so late. On the Friedlander plantation the water receded so late that it was impossible to make any crop, even a rice crop, as there was ditches or canals for that purpose.

Q. What about the bridges?

A. They were taken away by the flood; there was a great many on the plantation.

Recross-examination by Mr. BUCK:

Q. Were you on the Edmee plantation until October, 1884?

A. Yes, sir.

83 Q. Was it under cultivation?

A. Yes, sir.

Q. How much of that plantation was under overflow?

A. I suppose 250 acres.

Q. Was any sugar made on that part of the plantation?

A. No, sir; the cane was killed.

Q. Had they commenced to prepare the plantation for the crop of 1885 when you left?

A. No, sir; I think they are just commencing now.

JAN'Y 29TH, 1885.

Note.—All parties present.

DUSUAN HALPHEN, sworn for complainant.

Direct examination by Mr. LOUQUE:

Q. In what capacity were you in 1884?

A. Overseer of the Friedlander plantation.

Q. You are well acquainted with that plantation?

A. Yes, sir.

Q. How many acres of stubble cane did you have on that plantation in 1884?

A. About 100 acres of stubble.

Q. How many acres of plant cane?

A. About 162 acres.

Q. In what condition was the plant cane at the time of the crevasse?

A. At the time of the crevasse the whole crop was planted

84 and the cane up and everything very promising.

Q. At what date did the crevasse occur?

A. On the night of the 7th or 8th of March at about 3 o'clock in the morning.

Q. In the month of what?

A. March, as near as I can remember.
Q. On what plantation did the crevasse occur?
A. On the Davis plantation.
Q. How far from the Friedlander plantation?
A. I never measured it; I expect it is about ½ to ¾ of a mile.
Q. It was very close?
A. Yes, sir; there is only one place, the Lone Star place, between us and the crevasse.
Q. Who attended to the levee on the Davis plantation where the crevasse broke?
A. Mr. Virterbo took charge of the crevasse early in the morning and worked at it ½ day and had to give it up, as we did not have material.
Q. Who was in charge before the crevasse broke?
A. I do not know.
Q. Did the crevasse put any water on the Friedlander plantation; and, if so, how much?
A. It drowned the whole place out, except 40 acres in the immediate front.
Q. Was any of the 40 acres under cultivation?
A. No, sir; they were not under cultivation.
Q. What became of the plant and stubble cane that was on the plantation?
85 A. Drowned out by the water from the Davis crevasse.
Q. State in what condition the plantation was as regards drainage just previous to the crevasse?
A. The plantation previous to the crevasse was in number-one order. By a great deal of expense Mr. Viterbo had put the place in very good condition; we put in a new canal and dug out the lower canal and had all the ditches dug out.
Q. The place was in No. "1" condition?
A. Yes, sir.
Q. What was the effect of the crevasse on the drainage?
A. The canals were partially filled up here and there, in some places very little deposit, and some places a great deal; the smaller ditches were entirely filled up with sand.
Q. Would it be possible at the present time, in the condition in which the plantation is, to raise sugar cane on it?
A. Yes, sir; if a great deal of money would be thrown in.
Q. I mean in the condition it is now?
A. If I should be overseer I would ask the party employing me to give me hands in order to catch the month of January to repair the damage.
[Q.] In the condition this plantation is at the present day is it possible to raise any sugar cane on it taking it as it is?
A. There is no drainage on it now; unless you go [to] the expense of digging out the ditches and canals and putting the drainage there you cannot raise cane.
Q. I asked you if you could raise cane on it now in its present condition.
A. No, sir.

86 Q. By Judge VOORHIES: What do you understand by a sugar cane plantation?

A. I understand a sugar plantation to be a place that has enough cane on it to make a crop of sugar cane and the necessary drainage to cultivate that crop for the year; you cannot make cane if you do not have cane.

Q. What about bridges?

A. It requires bridges over the ditches and canals.

Q. Will you please state whether or not the Friedlander plantation to-day is a sugar plantation?

Objection: Mr. Buck objects to the question on the ground that it is irrelevant.

Ruling: Objection overruled.

Reservation: Mr. Buck reserves a bill.

A. I do not consider it a sugar plantation now, as there is no cane and no drainage.

Q. By Mr. LOUQUE:

Q. How many miles of drainage canals have you on that plantation?

A. I cannot say positively.

Q. Can you approximate?

A. I cannot say exactly; I have measured it, but I cannot recollect it now.

Q. Let us know as near as possible.

A. The new canal dug by Mr. Viterbo is 40 acres long and the other is the line canal, which existed before Mr. Viterbo took the place; we had to spade it 2 feet deeper the whole length, and that canal is longer than the other; it is about 50 acres long.

Q. By Judge VORHIES: In what condition are they now?

87 A. They are partially filled by deposit from the Davis crevasse.

Q. By Mr. LOUQUE: Mr. Viterbo, I understand, made an effort to protect the place?

A. Yes, sir; we worked night and day with men to protect the place, and surrounded the place with a levee, which was destroyed; we were 10 days and 10 nights on that levee, and it gave way next to the sugar-house.

Cross-examination by Mr. BUCK:

Q. The Davis crevasse is below the Friedlander plantation, is it not?

A. Yes, sir.

Q. How would the water flow to inundate the Friedlander plantation?

A. It flowed against the lower line, where the protection levee broke.

Q. Which levee?

A. The protection levee, on the lower line.

Q. The water came in through the rear, didn't it?

A. It came in at the front by the sugar house, where the levee broke.

Q. I understand you to say that it would be time to plant a crop of sugar cane?

A. Yes, sir; if Mr. Viterbo would get the necessary hands we could catch up for lost time.

Q. Before Mr. Viterbo planted this crop of 1884, you say
88 he put the plantation in first-class order and had a new canal dug and had cross ditches made?

A. Yes, sir; wherever we planted cane.

Q. What is its present condition?

A. It looks like all places that have been drowned out.

Q. It is covered with weeds?

A. Yes, sir; there are no bridges; the ditches are filled up; the canals partially filled. It looks like a wrecked place.

Q. Is not this due to the place being allowed to lay that way since the crevasse?

A. You could not do any work, as the water receded so late in July. Mr. Viterbo could not undertake to make any crop that late and nothing could be done.

Q. Would not that have been the proper time to restore the ditches and canals?

A. Well, if Mr. Viterbo had any intention of cultivating the places he could have prepared it in the fall of the year.

Q. By Mr. DINKELSPIEL: When did he commence on the Edmee plantation?

A. I do not know.

Q. By Mr. BUCK: Would it require as much labor if he had commenced immediately to fix the places as it will require now?

A. It would be some amount of money expended, but expended at another time.

Q. Do you mean to say that the place has been lying there for six months, with rain and storm and bad weather; that the ditches have no more deposit in them than they had immediately after the crevasse?

A. I do not know.

Q. Is it not the natural consequence of events that ditches
89 fill up with mud and have to be dug over?

A. Yes, sir; I admit that.

Q. Are not the ditches and canals for drainage put in proper condition every time a crop is planted?

A. Yes, sir; on all places they are well kept.

Q. You say these canals in some places are partially filled up; you mean that at certain spots there is more deposit than at others?

A. Yes, sir.

Q. How do you account for that?

A. I cannot account for that except by some obstruction or drift wood being in the way.

Q. Those are exceptional places?

A. You find it here and there.

Q. How many acres on the average?
A. I cannot say.
Q. About?
A. I cannot say; I do not know exactly.
Q. Leaving out these particular places, what is the average depth of the deposit?
A. I cannot say; I never measured it; I know there is a deposit, but I never measured it.
Q. What about is the depth from appearance to the eye?
A. You can see a great deal of deposit.
Q. Well, can you say about how much?
A. No, sir.
Q. There are still two canals?
A. Yes, sir.
90 Q. You can see them?
A. Yes, sir, of course.
Q. What kind of bridges are those you are talking about?
A. The bridges; I can give the history of the bridges when I first went there; they had been very bad bridges.
Q. Those were very common bridges?
A. Yes, sir.
Q. They are built very readily, are they not?
A. Yes, sir.
Q. When are they usually rebuilt?
A. Every three years.
Q. Those bridges are incidental to a sugar plantation?
A. Yes, sir; have to have them to cross the ditches and canals?
Q. So is the digging of the draining canals and ditches?
A. Yes, sir.
Q. It is just as much a part of a crop to keep the place in order as to plant the cane?
A. Yes, sir.
Q. By Mr. DINKELSPIEL: What particular injury has the deposit of sand done the plantation?
A. It has obstructed the drainage.
Q. Is it not a fact that it helps the land?
A. When it is deposited to a certain extent it does, but it does no good to the drainage.
Q. By Mr. BUCK: It would be necessary, there being no seed or stubble cane on the place, to get cane, so as to make it a sugar plantation?
A. You would have to get cane of course, not seed.
Q. You would have to get sugar cane?
A. Yes, sir; would have to get seed cane and ditch the place.
91 Q. What is the difference between seed cane and stubble cane?
A. The seed cane is the cane you plant this year and the stubble is the roots of the previous crop.
Q. Which come up again?
A. Yes, sir.
Q. They are utilized for 3 years?

A. No, sir; not the stubble cane, but the seed cane is.

Q. When you plant cane originally you plant with seed cane, and the next year you make your crop with stubble cane; is anything done to that stubble cane except to plough it—I mean when the same ground is used that you originally planted the seed cane in?

A. You simply plough it and cultivate it the same as seed cane, except that you do not put the cane in the ground.

Q. That is, in places where the stubble remains?

A. Yes, sir.

Q. In thatway you make a second crop?

A. Yes, sir.

Q. For how many seasons can you use the cane?

A. For 2 years for stubble—sometimes three years.

Q. Then you plant seed cane again?

A. Yes, sir.

Q. By Mr. DINKELSPIEL: You say you had charge of the Friedlander place when Mr. Viterbo took charge of it?

A. Yes, sir; Mr. Viterbo put me on the place as soon as he leased it.

Q. Tell us what Mr. Viterbo did to the place.

A. He took the place in a miserable condition and put it in good order.

Q. What did he do?

92 A. By spending a great deal of money and labor he prepared the crop of 1884; he ploughed and ditched and made new bridges, and made a canal where there was none 40 acres long in order to give drainage.

Q. You heard the testimony given by the witness yesterday?

A. I was not here.

Q. The plantation was described as having two canals—one running through the centre and one on the lower line of the plantation; were those canals there when you took charge for Mr. Viterbo?

A. The lower one was there.

Q. The middle or centre canal, was it there?

A. It was only a ditch 3 feet wide.

Q. And you dug that centre canal to the size of the lower canal?

A. Yes, sir.

Q. What was the depth of it?

A. It was dug about four feet on the average.

Q. Was it dug to the same depth as the lower canal?

A. Yes, sir; it was.

Q. What is the average depth of that canal (lower one)?

A. It is unequal—the land runs in ridges.

Q. What is the average depth?

A. About five feet, I suppose.

Q. What is the present depth of those canals?

A. I cannot say, from the very fact that I have not been on that place since the overflow; I don't know how those canals are now. Mr. Viterbo settled with me right after the overflow, and I never went over the fields except once, maybe, and I never paid much attention, except to notice that there was a deposit in the ca-

93 nals, more or less; in some places more and in some places less.

MASTER: Q. What did you do to that canal on the lower line when you took possession?

A. I had to dig it out from the swamp to the sugar house just two feet.

Q. What was its depth?

A. It was very unequal in its depth.

Q. What was its depth about?

A. In some places no depth at all.

Q. Was it necessary in order to get drainage to dig out this lower canal?

A. Yes, sir; there was more on the place.

Q. Was not this ditch you say was down in the centre of the plantation sufficient to give drainage?

A. No, sir; we had to have that centre canal, as there is a centre road that divides the plantation in two parts; I had to make that canal in order to drain the upper part.

Q. Could you have raised sugar without that canal?

A. No, sir, because there was water at the sugar house even when it rained; there was no drainage except a very little.

Redirect examination by Judge VOORHIES:

Q. How many arpents of cane will one arpent of cane plant?

A. Some seed cane will plant three, some 2, some 1, and some a great deal less. The cane I found, for instance, on the Friedlander plantation only planted ½ acre; it depends on the size and thickness of the cane.

94 Q. You stated that the land might be benefited by an overflow by the deposit left by the overflow; now, is it your opinion that the sugar plantation is benefited by an overflow?

A. It is very hard for me to answer that question; there is always some damage done; the ditches are closed, the bridges destroyed, and drainage is destroyed; but if you mean simply if the land is benefited, I say yes.

Q. I mean the sugar plantation—everything.

A. No, sir; it is not.

Q. So that the destruction of the whole crop of sugar may be fatal to the sugar planter, but beneficial to the soil of the plantation?

A. Yes, sir.

Q. By Mr. LOUQUE: How long have you been a sugar planter?

A. About 22 years.

Q. How long have you resided on the other place on the other side of the Friedlander plantation?

A. I only resided there 6 months in St. Charles parish; I resided most in Iberville parish, and the longest time in St. John parish.

Q. By Judge VOORHIES: Do you know of your own knowledge of any crevasses that has inundated the Friedlander plantation previous to the Davis crevasse?

A. No, sir; I don't know of my own knowledge.

Q. By Mr. LOUQUE: Have you been on any sugar plantation which has been overflowed?

A. Yes, sir; on one that had been partially overflowed.

Q. What plantation was that?

A. A. G. Buzais', in parish of St. John.

95 Q. Overflowed by what crevasse?

A. Bonne Carrie crevasse.

Q. After the water receded did you have occasion to plant anything in that overflowed land?

A. No sir; we considered it useless, as it would be eaten up by insects.

Q. That is the general experience of planters?

A. Yes, sir.

Q. By Mr. BUCK: You stated that immediately after an overflow if you plant a crop of cane it will be damaged by insects.

A. Yes, sir.

Q. So if you are compelled to plant a crop of cane on a plantation that has been overflowed, but on which the drainage has been left perfect, it will be destroyed by insects?

A. Yes, sir.

Q. Then the question of drainage is not the only question to be considered after an overflow?

A. No, sir.

Q. By saying if you would plant a crop of cane immediately after an overflow do you apply immediately to the entire subsequent season after the water has retired?

A. No, sir; I mean immediately after in the same year.

Q. In preparing the drainage of the Friedlander plantation for the crop of 1884, which was destroyed by the overflow, did you go over the entire cultivated portion of the plantation?

A. Yes, sir; I did—the ditches were all dug out.

Q. Were they new ditches?

A. No, sir; old ditches dug over. I had to do that in order to get drainage.

96 Q. Would not the same amount of labor, if not less, which you took to put that place in order, if now applied, put it in proper condition for the crop of 1885?

A. I would require pretty much the same labor for the drainage that I employed for the crop of 1884 for the drainage. At present I would have to have a very large force in less time to get the crop of 1885 in the ground and have the drainage good.

Redirect examination by Judge VOORHIES:

Q. Do you mean to say that it would take about the same labor now, but in less time, to prepare the drainage of that plantation for the crop of 1885?

A. Yes, sir; you see I have less time and therefore would require more hands.

Q. You say that, taking the condition of the plantation for the crop of 1884, as far as drainage is concerned, that you can in precisely the

same time prepare the plantation in its present condition for the crop of 1885?

A. I did not say precisely the same time, but about the same time with the same labor. You see all the canals are formed and only partially filled up now, whereas in 1884 the canal in the center was not there and had to be marked out.

Q. By MASTER: You expended a certain amount of labor to put that plantation in order for the crop of 1884; now would it require more or less labor to put it in order for the crop of 1885?

A. About pretty much the same labor.

Q. By Judge VOORHIES: You mean to say that the land and drainage for the crop of 1884 was precisely in the condition it is now?

97 A. The plantation is not the same as it was in 1884. When I took charge of it in 1884 I had to clear the land; it was covered with bushes, briers, and undergrowth. I had a great deal of labor to cut these down and clear the land. The plantation now has no undergrowth or obstructions.

Q. Is the Friedlander plantation now in the same condition it was when the lease was made?

A. No, sir; not exactly.

Q. It had some cane on it in 1884, when the lease was made?

A. We had some 212 acres of seed cane.

Q. What was the condition of the rest of the land?

A. It was taken up in undergrowth.

Q. What material difference do you find between the present condition of the Friedlander plantation as to canals and ditches to what it was in 1883 or 1884?

A. I find it about the same. In 1884 the ditches were obstructed the same as now; the canal was obstructed; a new canal had to be dug; there was no drainage; I see no difference.

Q. When you took charge were all the ditches filled up?

A. Not on all of it; only where I had to plant the crop of 1884.

Q. I asked you when you took it whether the ditches were filled all over?

A. No, sir.

Re-recross-examination:

Q. By Mr. DINKELSPIEL: Just describe the condition of that plantation as to ditches and canals when you took charge of it.

[A.] The ditches were in a miserable condition, some deeper than others and some nearly filled up; some places the ditches
98 were of the required depth—3 feet

Q. By Judge VOORHIES: How are they now?

A. In the lower portion of the plantation they are filled up, and in the upper portion they are less filled, because there was less water and less deposit.

Q. By Mr. DINKELSPIEL: What did Mr. Viterbo have to do to make that crop of 1884?

A. He had to ditch, plough, and replough it, because the land

was high in spots, and cross-plough in order to put in the crop and get the land level.

Q. By Mr. BUCK: Did he not make a canal in the centre?

A. Yes, sir.

Q. How long have you been engaged in sugar planting?

A. 22 years.

Q. Have you ever operated any plantation for your own account or as lessee?

A. No, sir.

Q. A great many plantations are operated by lessees, are they not?

A. Yes, sir.

Q. As a matter of fact, who attends to the drainage?

A. The overseer.

Q. At whose expense?

A. The expense of the owner.

Q. Where it is a leased plantation at whose expense?

A. I expect at the expense of the one that leases.

Q. Is it not at the expense usually of the one that runs the plantation?

99 A. I suppose the one that carries on the work.

Q. By Mr. LOUQUE: Have you been in the swamp since the crevasse?

A. No, sir.

Q. Have you been there in the vicinity recently?

A. No, sir; not since the water receded.

Q. By Mr. DINKELSPIEL: What became of the stock on the place?

A. They are on the place.

Q. Who is taking care of them?

A. A hostler, employed by Mr. Viterbo.

Q. What became of the other truck on the place?

A. It was put away; I had everything locked up, and all the carts brought up.

Q. Who is feeding the mules now, if anybody?

A. There is a hostler employed by Mr. Viterbo; the regular one I employed—the same man.

Q. By Mr. BUCK: I believe you stated that the digging of ditches is as much incidental to the planting of cane as the ploughing of the land?

A. Certainly; you cannot make cane without drainage.

Q. How far from the river to the swamp have you been since the water receded?

A. I have been up to and in the woods, but not in the swamp.

Q. Do you know what is the condition of the swamps as to the amount of deposit left in them?

A. I cannot say; the land that lies back of the Morgan R. R. has more deposit than in front.

Q. You do not know how much deposit there is in the swamp where the canals end?

A. I do not know; I was never there.

100 Q. Could not the swamp be so filled up with deposit as to make it impossible to drain that plantation?

A. I don't know; I have not been there since the water receded and did not notice.

LEON VITERBO sworn for complainant.

Direct examination by Mr. LOUQUE:

Q. What is your relationship to Mr. Richard Viterbo?
A. He is my cousin.
Q. Are you employed by him?
A. Yes, sir.
Q. In what capacity?
A. I am an overseer.
Q. Of what plantation?
A. The Edmee plantation.
Q. Have you ever been on the Friedlander plantation?
A. Yes, sir.
Q. Before the crevasse?
A. Yes, sir.
Q. Have you been on that plantation since the crevasse?
A. Yes, sir.
Q. By Judge VOORHIES: Have you been ofter there before and after the crevasse?
A. Yes, sir.
101 Q. Before, for how long?
A. Over three years, every day.
Q. Since the crevasse?
A. I have been three times.
Q. Three times in all?
A. Yes, sir.
Q. How far have you been those 3 times?
A. To the woods.
Q. In what condition are the ditches of the plantation?
A. They are in a bad condition; the larger portion are filled up with sand.
Q. What is the condition of the canals?
A. The canals in some portions are filled up with sand.
Q. And the other portions of the canals, how are they?
A. Some very much filled up and some others not much.
Q. What has become of the cane that was on the plantation?
A. The cane was flowed by the overflow and was destroyed.
Q. Do you remember in what condition the cane was at the time the crevasse occurred?
A. Yes, sir.
Q. State its condition.
A. It was a good stand of cane.
Q. Do you remember the amount of plant and stubble cane that was on the place?
A. Yes, sir.
Q. How much?
A. 160 or 162 acres plant cane.
Q. How much stubble?

A. About 90 or a 100 acres.

102 Q. How much of that crop remained after the overflow?

A. Nothing at all.

Cross-examination by Mr. BUCK:

Q. How long have you been on the Edmee plantation?

A. Two years and 8 months.

Q. Mr. Viterbo was working the Edmee plantation before he leased the Friedlander plantation?

A. Yes, sir.

Q. How many years?

A. When he started to work the place I was with him.

Q. How many crops had he made on the Edmee plantation before he leased the Friedlander plantation?

A. The crops of 1882 & 1883.

Q. Did you have anything to do with the Friedlander plantation?

A. I was inspecting them both (the Edmee and Friedlander.)

Q. You acted as a representative of Mr. Viterbo?

A. Yes, sir.

Q. For both of these plantations?

A. Yes, sir.

Q. The Friedlander plantation was managed by the witness just examined (Mr. Dusnan Helphen?)

A. Yes, sir.

Q. Have you any knowledge yourself of sugar planting?

A. Yes, sir; but my experience consists of only two years.

Q. You heard the testimony of Mr. Helphen as to the repairs of the Friedlander plantation made before the crop of 1884 was put in the ground?

A. Yes, sir.

103 Q. Is it correct?

A. Yes, sir.

Q. A great deal of work was done there, as I understand?

A. A quantity of bridges were built.

Q. And a great number of ditches made?

A. Yes, sir.

Q. And a canal made and one dug out?

A. Yes, sir.

Redirect examination by Mr. LOUQUE:

Q. By taking the canals as they are now, is it possible to get the same drainage on that plantation that you had before the crevasse?

A. I cannot tell you exactly, because I never have been in the woods since the crevasse; maybe the woods are very high, and we would have to put in a draining machine.

Q. You don't know if they are high or not?

A. No, sir.

FEB'Y 5TH, 1885.

NORBERT LOUQUE sworn for complainants.

Direct examination by Judge VOORHIES:

Q. How old are you?

A. Seventy-three on the 9th of May next.
Q. Where do you reside?
A. In St. Charles parish.
104 Q. How long have you resided there?
A. About 10 years, in St. Charles.
Q. Previous to that time?
A. Bonne Carrie, in St. John parish.
Q. How long have you been a sugar planter?
A. 46 years.
Q. Have you any experience as to overflows and crevasses?
A. I should think so; I was overflowed seven times.
Q. How often did you re-establish your plantation after overflows?
A. Five times.
Q. Are you acquainted with the Friedlander plantation?
A. Yes, sir; I went there yesterday.
Q. Did you examine it thoroughly?
A. Yes, sir; I went over it on foot.
Q. In what condition did you find the bridges?
A. No bridges at all.
Q. In what condition did you find the cane crop?
A. There is no cane there.
Q. In what condition did you find the ratto-ns or stubble cane?
A. There is none there, because a deposit covers the ground.
[Q.] In what condition are the ditches?
A. They are no account.
Q. What is the matter with them?
A. They are filled up, some clean up to the edge and some not so full; they cannot be used for drainage.
Q. In what condition did you find the two canals?
A. Some portions filled up and some not so much and some very little.
Q. What do you understand by a sugar plantation?
105 A. I have been raised on a sugar plantation, so I think I am competent.
Q. I asked you what you understand by a sugar plantation.
A. A place where you raise cane, grind it, make sugar, and sell it.
Q. In order to make a cane crop are bridges, ditches, and canals necessary?
A. It requires bridges on the roads over the ditches and canals.
Q. What about ditches and canals?
A. You have to have canals to drain the place to raise sugar cane, also ditches.
Q. You have just stated that you visited the place yesterday; will you please state whether you saw a sugar plantation?
A. I saw a sugar house; that is all.
Q. In what condition is the land?
A. The land is covered with sand; the condition in which it now is you would not be able to raise any cane.
Q. How far did you go over the place?
A. I went clear to the woods.

Q. What is the appearance of that plantation as a sugar plantation to-day?

A. Has no appearance at all of a sugar plantation.

Q. Why?

A. Because it is all destroyed by the crevasse.

Q. In case this land or plantation should be recanaled and reditched what would be the consequence immediately after a rain?

A. After a rain all the sand wash- back in the ditches and canals, and you have to go over them 3 or 4 times; that always hap-
106 pens after an overflow.

Q. You know that from experience?

A. Yes, sir.

Q. Supposing it had not been overflowed, would it be necessary after every heavy rain to reditch or clean out the ditches?

A. No; it is only the quicksand left by the crevasse that washes in the low places.

Q. By quicksand you mean the deposit left by the crevasse?

A. Yes, sir.

Q. What would it cost to put that plantation in order for a sugar plantation; would it not cost an enormous amount for repairs?

Objection: Mr. Dinkelspiel objects to the question on the ground that it is irrelevant to the issue.

Ruling: Objection sustained.

Reservation: Judge Voorhies reserves a bill.

Cross-examination by Mr. BUCK:

Q. You stated when a plantation is once covered with a deposit like the deposit on the Friedlander plantation, that the ditches and canals will readily fill up again whenever it rains?

A. Yes, sir.

Q. On that theory it is not probable that a great deal of the sand you now see in the ditches and canals was washed into them by rains since the crevasse?

A. No; that was not what I say; I say whenever it rain- the quicksand washes back into the ditches and canals; that is, when they have a heavy rain. If you clean a canal or a ditch that is filled with sand, that same sand you take out goes back when it rains hard. From my experience I have to clean my canal
107 5 or 6 times after a crevasse, for the sand I take out wash- in again.

Q. Do you know when this crevasse occurred?

A. It occurred in the spring of 1884.

Q. Do you know when the water receded from the Friedlander plantation?

A. No, sir; I just went there yesterday.

Q. Do you mean to tell us that the ditches and canals on that place are not filled up more now then they were immediately after the crevasse?

A. I never say that; I cannot say that, as I never saw the canal before the crevasse; I only went there yesterday.

Q. Outside of the question of the expense of digging the ditches and canals is there any reason why a crop of sugar cane cannot be planted on that plantation?

A. Not at all.

Q. There is a sugar house there?

A. Yes, sir.

Q. Buildings and stables?

A. Yes, sir; everything is there; but you cannot raise a crop of cane this year; you have to raise a crop of corn and cowpeas this year, and next year you can plant cane.

Q. You cannot plant a crop of cane at all this year?

A. You cannot as the place now stands.

Q. With the ditches and canals all dug out?

A. No cane will grow this year; it will not now; it's late.

Q. It might have been planted and not rotted if it had been planted in the proper season?

A. I don't think, because you must raise first a crop of corn and cowpeas before you put the cane in the ground.

Q. That is simply one of your theories, is it not?

A. You won't succeed to make any crop of cane in the land
108 what has been overflowed unless it is first purged.

Q. By Mr. DINKELSPIEL: Were you acquainted with this Friedlander plantation when Mr. Viterbo first took possession of it?

A. I knew of the place well before, but never saw it before then.

Q. Do you know its general reputation?

A. Yes, sir.

Q. What was its reputation when Mr. Viterbo first took possession of it?

A. It used to produce very fine crops.

Q. When was that?

A. In 1853.

Q. Do you know what reputation it had when Mr. Viterbo leased it?

A. I do not know anything about that.

Q. At whose request did you visit this plantation on yesterday?

A. Mr. Viterbo's—Mr. Layance Viterbo's; he met me on the street last Friday, and asked me if I would go and examine the Friedlander plantation, and I told him yes.

Q. For what purpose did he tell you?

A. I do not know.

Q. What did he say to you?

A. He said [he] wanted to know if there was any way to raise cane on that property this year, and I told him no, and he asked me to go and look at the place.

Q. Did he say anything more than that?

A. No, sir.

Q. Did you see him again?

A. Not after that.

109 Q. Did he tell you he wanted you to be a witness in this case?

A. No, sir.

Q. How did you come to be a witness, then?

A. I met the young man, and he asked me if I would be kind enough to go there, as I was an experienced man, and see what damage had been done by the crevasse.

Q. And that you would testify in this case?

A. Yes, sir.

Q. Now, as a sugar planter, and as a man of experience, if Mr. Viterbo had gone to work and attended properly to his ditches after the crevasse went down, could he not have planted cane there this year?

A. No, sir; because the land is not purged; the land was covered for five months, and the land is soaked with water, and it was covered all over with this crevasse water. You see, to plant cane after you had a crevasse, you must drain it first, and then plant corn and cowpeas, or cowpeas only, to purge it; you cannot plant cane in such land as that is now.

Q. Did you go on the Edmee plantation yesterday, or at any time since the crevasse?

A. Yes, sir; I went on the place.

Q. Do you know whether the Edmee plantation, or a portion of it, was overflowed by water?

A. No, sir; I did not pass on that portion.

Q. Do you know that Mr. Viterbo has ditched and planted the portion of Edmee plantation that was overflowed in cane?

A. I do not know, sir.

Q. It is a fact, nevertheless?

A. I do not know it.

110 Q. Are you a relative of Mr. Viterbo?

A. I am not a relative; I only know him by sight.

Q. Are you acquainted with Mr. Charles Louque?

A. That is my son.

Q. By Mr. BUCK: As a sugar planter, do you know or is it not a fact that many of the sugar plantations in this State are operated by the lessees of the plantation?

A. Some of them.

Q. Have any of those plantations managed by lessees been overflowed?

A. Yes, sir; on the other side of the river; all of them pretty much. I know some planters that have suffered very much from overflows.

Q. Do you know of any plantations leased by the planter from the owner that has been overflowed?

A. I never heard of any.

Q. Do you know of any plantations while under lease being overflowed?

A. I do not know about that. I know some men who raise rice having their place what they leased overflowed. I do not know of any place leased for sugar being overflowed?

Q. Do you not know of your personal knowledge of any plantation leased for sugar culture being overflowed?

A. No, sir.

Redirect examination by Judge VOORHIES:

Q. What difference is there between the ditches that have been made after an overflow and those that were made before an overflow?

A. A great difference.

111 Q. Please state what the difference is.

A. Before the overflow the ground is hard and solid and it will stand; but when you have an overflow you have the ground covered with quicksand, and when it rains this quicksand washes back in the ditches and you have to go and clean it out fully 3 or 4 times in one crop.

Recross-examination by Mr. DINKELSPIEL:

Q. The ditches could be cleaned only at a cost of a great deal of money?

A. Yes, sir.

Q. By MASTER: You say you have never planted cane after an overflow; so all of this testimony is only theory on your part?

A. No, sir; I never planted cane after an overflow, but I saw my neighbor do it.

Q. What neigbbor?

A. The Peacon place.

Q. How much did they plant?

A. 100 acres of cane.

Q. Did any of that cane come up?

A. Yes, sir; but it never made any sugar.

Q. How high did it grow?

A. About 4 feet.

Q. Is that the only time you ever saw cane that was planted after an overflow?

A. That was the only place on which I saw it.

Q. Did you ever see it anywhere else?

A. That is the only time.

112 Q. That is the only instance you know of?

A. Yes, sir.

Q. Did they cut that 100 acres of cane that year?

A. Yes, sir.

Q. Did it make sugar?

A. No, sir.

Q. Did it grow cane the next year?

A. No, sir; the stubble was rotten, every bit of it, and I understand that is always the case after an overflow when the land has water on it for some time; it gets water-soaked, and takes a long time to get the land drained well.

Q. Was that stubble planted that year?

A. Yes, sir.

Q. And you say it rotted down?

A. Yes, sir.

Q. And did not come up the next year?

A. Yes, sir; it did not come up the next year, because the worms

ruined all the eyes by boring holes in them and they rotted and, of course, could not grow.

Q. What was done with that ground when the stubble did not come up?

A. They put corn in it.

Q. Is that the only case you know of your own personal knowledge?

A. Yes, sir; the only one of my personal knowledge.

Offer: Mr. Louque offers in evidence the two contracts of lease, the letter to Mr. Friedlander and the answer of his attorneys thereto, all of which are annexed to the answer in this case.

113 Admittuor: It is admitted by all parties that no answer was ever sent to the letter of Mr. S. Friedlander's attorneys, sent by them for Mr. Friedlander, in answer to the letter sent to Mr. S. Friedlander in the first instance.

J. B. GASSEN sworn for plaintiffs.

Direct examination by Mr. LOUQUE:

Q. Where do you reside?

A. In St. Charles parish.

Q. How far from the Friedlander plantation?

A. About one-half a mile.

Q. How long have you resided there?

A. Since 1856.

Q. When was the last crevasse in your section of the country, to your personal knowledge?

A. In 1858, at Le Branch place.

Q. How far from the Friedlander plantation is the Le Branch place?

A. About 2 miles.

Q. Since then has there been any crevasse on the Friedlander plantation?

A. Yes, sir; the Davis crevasse.

Q. Since 1858 has there been any crevasse on the Le Branch plantation?

A. No, sir; there has not been for fully 25 years.

Q. By Judge VOORHIES: Do you know of any inundation or crevasse that has taken place below or above the Friedlander plantation since or for the last 20 years?

A. None that I know of.

114 Q. Were you there all the time?

A. Yes, sir.

Q. You have been in good health, going about, and fully acquainted with what has been going on in the country around there, and saw no inundation for the last 20 years?

A. Yes, sir; I have been in good health and know everything going on, and have never seen any crevasse there since then.

Q. Since the crevasse in 1858, you mean?

A. Yes, sir.

Cross-examination by Mr. BUCK:

Q. Do you know of any inundation or crevasse except the one you have spoken of on any other place on the Mississippi river?

A. I know of no crevasse since the one of 1858.

Q. Do you know of any in the State of Louisiana?

A. I do not know that; I suppose they had some *of* Bayou Lafourche; I am speaking now of St. Charles parish—the crevasses there.

Q. Have you any personal knowledge of any crevasse other than those you have mentioned?

A. Not in St. Charles parish.

Q. Anywhere else?

A. I do not know.

Q. By Mr. DINKELSPIEL: Did you ever see an overflowed plantation?

A. Yes, sir; I have seen one.

Q. Which one?

A. Well, I have seen the Le Branch crevasse and this Davis crevasse.

Q. When did the Le Branch crevasse occur?

115 A. In 1858.

Q. That was the last time?

A. Yes, sir.

Q. You were living close to it at that time?

A. Yes, sir.

Q. Who owned that plantation at that time?

A. Themselves.

Q. The Le Branches?

A. Yes, sir.

Q. Did they make, or attempt to make, a crop of sugar cane the following year on that plantation?

A. I do not know; I do not recollect.

Q. You spoke, I believe, of other crevasses that occurred on other plantations?

A. No, sir; that is the only crevasse that I saw except the Davis crevasse last year.

Q. Do you own a plantation anywhere in this neighborhood?

A. Yes, sir.

Q. Were you overflowed by the Davis crevasse?

A. Yes, sir.

Q. Entirely overflowed?

A. All except 10 acres from the river.

Q. Have you planted cane this year yet?

A. No, sir.

Q. Are you going to?

A. I am expecting to plant.

Q. Did you plant last year?

A. I was overflowed last year.

Q. This year you are going to plant?

116 A. Yes, sir.

Q. What are going to do first?

A. Plough, of course.
Q. Are your ditches full of water?
A. Certainly; full of water with all the rain we have had the other day.
Q. I am speaking of water from the overflow?
A. Not much now.
Q. How much at the time of the overflow?
A. Not very much.
Q. What damage was done to your canals by the overflow?
A. Not much.
Q. What became of your bridges?
A. Well, I have not got a big plantation; it is a small plantation; only one acre front on the river.
Q. By how many deep?
A. 90 acres deep.
Q. You have been a sugar planter all your life?
A. No, sir; a rice planter; I am not a sugar planter, but a rice planter.
Q. How long have you been engaged in sugar planting?
A. I — never been engaged in sugar planting.
Q. What was the price of sugar two years ago?
A. I do not recollect.
Q. Were you engaged in sugar planting two years ago?
A. No, sir; I have never been engaged in sugar planting.

117 *Testimony for Defendant.*

SATURDAY, *Feb'y 7th*, 1885.

JULES BROU sworn for defendant.

Direct examination by Mr. DINKELSPIEL:

Q. What is your business?
A. Now I am nothing—doing nothing.
Q. What has it been?
A. I have been working on a sugar farm since 1847.
Q. Up to how long ago?
A. Until last spring.
Q. In the capacity of owner?
A. I worked as foreman for the last 3 years, and before that I worked for other people.
Q. In what parish?
A. I worked 6 years in St. Charles parish, and the balance of the time in Plaquemines parish.
Q. Whilst conducting a sugar plantation or plantations at any time during your management of the plantation, did you have an overflow?
A. Yes, sir.
Q. How many?
A. I had 3 overflows, two total overflows and one partial overflow.
Q. When were they?
A. One was in 1858, one two years ago, and one last year.

Q. Tell us what occurred in 1858, and whether or not you attempted to make a crop of sugar cane after that overflow in 1858?

A. Well, the first crop I made after the overflow of 1858
118 was the best crop I ever made all the time I was working on a sugar farm.

Q. What occurred in the second overflow?

A. That is about 3 years ago; I had part of that plantation overflowed, the back land; the water came up, but I protected the front land and saved all of it, and the year following I took in the back land and it turned out to be my best crop.

Q. How did the cane compare that came off the portion that was overflowed with that that came off of the land that was not overflowed?

A. The land that was not overflowed I had to manure and put fertilizers —; the land that was overflowed gave more cane and better cane, and I did not put any manure or fertilizers on it.

Q. What was the condition of your plantation in 1858, when it was entirely overflowed?

A. In 1858, directly after the crevasse, there was not a stick of cane left; not a fence; everything was lost entirely, except the bridges; we saved and put them back after the water went down; we had to buy cane at about 3 miles from where our place was and on the opposite side of the river; I think we paid $125.00 or $150.00 per acre for that cane and we bought about that many acres; that cane was ½ rotten; we saved only ½ of it for seed, and planted it and had a good crop.

Q. What occurred in the 2d crevasse?

A. That was the Live Oak crevasse, which occurred 2 years ago.

Q. What occurred after that overflow?

A. I have already stated that the land in front was not overflowed, and we had to fertilize it, and the land that had been overflowed I worked it, but used no fertilizers, and it gave the best cane.

119 Q. Last year you were overflowed entirely, you say?

A. Yes, sir.

Q. And you have not worked the place that was overflowed yet?

A. No, sir.

Q. Why?

A. I did not work it because sugar is so low now; in 1858 sugar did not sell so low, and we had hands that we had to clothe and feed if they worked or not.

Q. That was in slavery days?

A. Yes; the slaves; we had to take care of them; now we hire them, and, when we have no work, we discharge them; I would not plant cane there now, because sugar is so low; I, maybe, will make a rice crop.

Q. In 1858 you worked your place with your own hands or slaves?

A. Yes, sir.

Q. But now you have to hire hands, and can send them off when you have not work for them?

A. Yes, sir.

Q. By Mr. BUCK: To what depth was your plantation overflowed in 1858?

A. We got overflowed on the 7th of July; we fought the backwater from the first of April until the 7th of July; we were overflowed in some places a foot and in others more or less up to 5 feet.

Q. The next following year you planted a crop of sugar cane?

A. Yes, sir; we bought cane and went to work and raised cane.

Q. Have you any knowledge or experience with regard to raising cane on an overflowed plantation immediately after the plantation has been overflowed?

120 A. Of course; because, as I have told you, we were overflowed in 1858, and in 1859 we made a large crop, as I have told you all; but that year we had no deposit on the land; but it was fully covered with water.

Q. You say you had no deposit on the land after the overflow of 1858?

A. No, sir; we had no deposit.

Q. Did you have a deposit on that plantation in the overflow 2 years ago?

Objection: Judge Voorhies objects to all evidence as to the condition of other plantations except the Friedlander plantation.

Ruling: Objection overruled. Reserves a bill.

Q. You stated you saved your bridges during that overflow?

A. Yes, sir.

Q. How did you manage to save them?

A. I pulled them up on high land and saved them; we took them away before the water got to them the same as we did with the fences; took them all down and put them away, and when the water went down we put them back.

Q. Have you any knowledge of the effect of an overflow where there is a deposit left on the land?

A. I never worked a plantation with a deposit on it, but I saw a plantation overflowed two years ago below the city. They took that land directly after that crevasse and put cane in it and it gave a splendid crop.

Q. Was there any deposit on it?

A. Yes, sir; about fully three inches all over it. I saw when the cane was put in the ground, and it was not very good cane, as I told the young man; I saw it when it was cut; it was very fine

121 cane and full of sugar.

Cross-examination by Judge VOORHIES:

Q. You state that on the plantation that was overflowed in 1858 there was no deposit?

A. No, sir; the water came from 35 miles and it was clear water, like rain-water.

Q. How long did the crevasse last on the Live Oak plantation?

A. As long as the river staid high; when it went down the water went off of the place. I think it went off in the latter part of Au-

gust and I had to keep the draining machine working for some time after that.

Dr. PERRET sworn for defendant.

Direct examination by Mr. DINKELSPIEL:

Q. Do you know the Friedlander plantation?
A. Yes, sir.
Q. What is your business?
A. A commission merchant in this city.
Q. Have you ever been a sugar planter?
A. Yes, sir; I was raised on a sugar plantation.
Q. Until what age?
A. Until I was 30 years old.
Q. Have you been a commission merchant since you were 30 years old?
A. No, sir; not exactly; but since then I have had always
122 something to do with sugar plantations.
Q. Have you ever had charge or owned a plantation which has been overflowed?
A. No, sir; I never had charge or owned one.
Q. Do you know of your own knowledge of plantations that were overflowed?
A. Yes, sir.
Q. Where were they?
A. Several plantations in the parish of St. John the Baptist, Mr. Morris' plantation, the gold-mine place, which was overflowed when I was a young man; and there was Mr. Le Place's plantation that was also overflowed.
Q. Were these plantations partially or totally overflowed?
A. They were totally overflowed by the Bonne Carrie crevasse.
Q. Will you please tell us whether or not, after a total overflow, a crop of sugar was made on any of those plantations; if so, when and on what place?
A. I know Mr. Le Place; the year after the last inundation of Bonne Carrie, which lasted for 9 years, he made his sugar crop.
Q. On the other plantations did they make crops?
A. I cannot tell you, as I was very young; but since that time they have produced very good crops.
Q. Did any of the places you speak of have the ditches filled with deposit, or partially filled with deposit, by the overflow?
A. Yes, sir; there was a great deal of deposit on the Le Place place; there was hills of five to six feet deep and more.
Q. What effect did that deposit have on the following planting?
A. I know that a crop of cane was planted in it, and it was
123 magnificent.
Q. Were all the ditches there?
A. No, sir; we had to dig new ditches.
Q. He had to do that?
A. Yes, sir; when they were filled up.
Q. He did that, and made a successful crop the following year?
A. Yes, sir.

Q. What effect, from your knowledge, has a crevasse on a sugar plantation?

A. It enriches the land, as the deposit from the Mississippi river is a great improvement to the soil.

Q. Do you know anything about the last overflow on Mr. Friedlander's plantation?

A. No, sir; I have not been on the place since the inundation.

Cross-examination by Judge VOORHIES:

Q. You say that deposit improves a plantation?

A. Yes, sir.

Q. If you had a sugar plantation on the Mississippi river would you be willing for it to be overflowed?

A. Yes, sir; if I had the means I would have it overflowed every 3 or 5 years.

Q. Have you had any personal experience as to the effect of overflows?

A. No, sir; I have seen it done in the parishes where I lived.

Q. Have you made any calculation as to the result of having your plantation overflowed every 5 years, and of the benefit you would derive from the crops you would make during the four years?

A. I never went to the trouble of doing so.

124 Q. Have you calculated what would be your gain by losing a crop every five years and making only 4?

A. No, sir.

Q. It is simply an opinion of yours?

A. It is my opinion and it is generally admitted by all planters.

Q. You say it is generally admitted?

A. Yes, sir.

Q. It is the general opinion that all planters would be willing to be overflowed by a crevasse every 5 years, as they would make up the loss by larger crops in the four years after?

A. Yes, sir; there is a way of flooding a place; I do not mean for the levee to break and destroy everything.

Q. You mean a moderate inundation?

A. Yes, sir.

Q. Do you consider an inundation which destroys all the bridges, fills the ditches, and nearly fills the canals a benefit to a plantation?

A. When the ditches and canals are only filled I do, for they have to be cleaned out any way; but I have not made any calculation as to the cost of cleaning them out when they are filled.

Q. Supposing the bridges are all swept away, the ditches filled up, the canals partially filled up, and the fences gone, is that a benefit to a plantation?

A. No; it could not be exactly; I cannot say. The land would be benefited and enriched, and that is all.

Q. Supposing all the plant cane and stubble was washed away, all the bridges destroyed, the ditches filled, and the canals nearly filled, and the place completely destroyed except the buildings,

125 would you not consider that a complete destruction of a sugar plantation?

A. Yes, sir; it would be a partial destruction of it.

Q. If there was no cane left, no drainage, would you call it a sugar plantation?

A. It would not be actually a sugar plantation as long as there would be no sugar cane on it.

Q. Do you not require canals, bridges, and ditches on a sugar plantation?

A. Yes, sir.

Redirect examination:

Q. What would make it a sugar plantation?

A. You would have to have ditches and canals and cane to plant.

Q. In other words you would have to put the land in condition?

A. Yes, sir.

Q. The digging of ditches is an incident of sugar planting?

A. Yes, sir.

Q. Sugar cane requires good drainage?

A. Yes, sir.

Q. Are not the ditches redug every season?

A. No, sir; only every other year.

Q. So that a ditch will last for two crops?

A. They have to be kept in order as you go on.

Q. Is there any reason why, assuming the conditions of things as stated by Judge Voorhies in a former question, a crop of cane could not be planted without the bridges and without drainage?

A. No, sir; it could be planted.

Q. The plantation would be a sugar plantation then?

126 A, Yes, sir; it would have sugar cane on it.

Q. It becomes a sugar plantation as soon as sugar cane is planted on it?

A. Yes, sir.

Q. If rice was planted on it, it would become a rice plantation?

A. Yes, sir; it would be a rice plantation.

Q. So when you say a plantation is not a sugar plantation you mean that it was not cultivated as such?

A. Yes, sir.

Q. Judge Voorhies asked you whether it was simply your opinion that the land is enriched by an overflow. Now, I ask you whether that opinion is not founded on experience?

A. All the lands to my knowledge that have been overflowed have the reputation of being the most valuable.

Q. Have you had any personal experience?

A. I never cultivated land immediately after an overflow; but I have cultivated land that I knew had been overflowed some years past, and that land always gave the crops, and it had been overflowed several years previous.

Q. It is not, then, a simple abstract opinion of yours, but an opinion based on facts and beliefs?

A. It is a belief based on what I know to be generally conceded, that the land is better after an overflow than before one.

Q. By the MASTER: When you say a sugar plantation without

the bridges, the ditches filled, the cane gone, is not a sugar plantation, you mean to say that there is no cane growing there, or do you mean to say that it is not a sugar plantation?

127 A. I mean it is not a sugar plantation, but is capable of being restored, and could be restored into a sugar plantation.

Q. I understand you to say that a plantation having been overflowed, the bridges washed away, the ditches filled, the canals partially filled, and the cane all destroyed, although the sugar house and machinery is left on the plantation, is not a sugar plantation, because no sugar cane is growing upon it?

A. I mean it can be made a sugar plantation, but there is no sugar cane on the Friedlander plantation.

Q. Well, then, the Friedlander plantation is not a sugar plantation, because it has no cane on it?

A. No, it is no sugar plantation now, but can be made one.

Q. It is a destroyed place now, as I understand?

A. I did not call it a destroyed plantation; I call it still a plantation that can be made fit for the cultivation of sugar cane.

Q. What kind of a plantation is it now?

A. It is still a sugar plantation; if they should now plant rice on it, it would be a rice plantation.

Q. It is still a plantation?

A. Yes, sir, of course; you could call it a sugar plantation until it was planted in something else.

Q. Do you regard that plantation as destroyed?

A. I do not regard the plantation as destroyed; I regard it as a sugar plantation without any cane growing upon it; I could not call it a rice plantation; I regard it as a sugar plantation, because there is a sugar house on it, and everything to make sugar but the cane.

Q. By Mr. DINKELSPIEL: If you wanted to make that plan-

128 tation a sugar plantation what would you do?

A. I would plant cane on it.

Q. Then what would the plantation be?

A. A sugar plantation.

Q. By Mr. BUCK: If, with the cane being planted and the sugar house and everything there to make a crop, an overflow happens, the cane rots, the bridges are destroyed, ditches filled up, and fences swept away, would that plantation cease to be a sugar plantation simply because the cane is destroyed, the ditches filled up, and the bridges and fences swept away?

A. They can put cane on it and make it a sugar plantation and fix the bridges and ditches.

Q. Would you in speaking of a sugar plantation that has been known as a sugar plantation for years, with a sugar house on it, call that plantation anything except a sugar plantation?

A. No, sir; it is still a sugar plantation.

Q. The Friedlander plantation is known as a sugar plantation, is it not?

A. Yes, sir.

Q. By Mr. DINKELSPIEL: What kind of a plantation is the Friedlander plantation?

A. A sugar plantation.

Q. Have you heard anybody call it anything else?

A. No, sir; it is fixed up for a sugar plantation and every one calls it a sugar plantation.

Q. By Judge VOORHIES: Have you visited the Friedlander plantation?

A. No, sir.

129 Q. You do not know [in] what condition it is now?

A. No, sir.

Q. Supposing the crop of sugar totally destroyed, the ditches filled, the canals partially filled, no bridges and no drainage left, and nothing left except the sugar house, and no cultivation on it, would you call it for 10 years a sugar plantation?

A. With no crop on it, and not cultivated at all, I would call it a sugar plantation not in cultivation; that is, if the land was fit to be worked.

Q. You make a distinction between plantation that is fit to be worked for sugar-cane planting and plantation that is actually a sugar plantation?

A. Yes, sir.

Q. The plantation of Mr. Friedlander might early be made a sugar plantation by digging the ditches and making bridges and cleaning the canals and planting a regular crop of cane?

A. Yes, sir.

Q. You would have to do that in order to restore it to a sugar plantation?

A. Yes, sir.

Q. By Mr. BUCK: Would it be turned into a sugar plantation by digging all the ditches out and canals, and building new bridges and fixing everything complete, but not planting any cane?

A. It would be no sugar plantation actually unless the cane is planted.

Q. So if you plant cane on and leave the ditches and everything as they are it would be a sugar plantation by the simple fact of having cane on it?

130 A. Yes, sir.

Q. So a plantation in every respect fixed for a sugar plantation would not be a sugar plantation unless there was cane in the ground?

A. Yes, sir.

Testimony for Defendant.

TUESDAY, *Feb'y 10th*, 1885.

TYLER P. LOVEJOY, being sworn for defendant, says:

Direct examination by Mr. DINKELSPIEL.

Q. How old are you?

A. Born in 1827.

Q. What is your business?

A. I am a mechanic trained (or by trade, as it is called); since I have been in Louisiana I have been a planter.

Q. When did you come to Louisiana?

A. 1850.

Q. What kind of a planter have you been?

A. A sugar planter.

Q. Are you acquainted with the Friedlander plantation in the parish of St. Charles?

A. I was manager of the place adjoining it.

Q. Whose place is that?

131 A. The place belongs to Mr. Sunmor, and is now Mr. Viterbo's.

Q. How long were you on that place?

A. From 1874 until 1882.

Q. Is that the Edmee place?

A. Yes, sir.

Q. Do you remember the time that Mr. Viterbo leased the plantation from Mr. Friedlander?

A. No, sir; I was not on the place at that time; I left the place in Jan'y, 1883.

Q. At what time did he lease it?

A. In December, 1883.

Q. What was the condition of the Friedlander plantation when you left there?

A. I could not tell you exactly; I did not pay much attention to it; I only passed through it, and have hunted over it, and I did not consider it in very good condition for sugar planting.

Q. What was the condition of its ditches and canals?

A. The ditches and canals had not been been much worked, and they were shallow and rather filled up.

Q. From your experience what is necessary relative to the ditches; what is necessary to be done from year — to keep them in proper order?

A. After you have your canals and ditches to the proper depth and width you clean then out and keep them clean; I clean mine twice a year; I clean them immediately after grinding and immediately after the crop is laid by.

Q. Is that the usual custom?

A. I think it is the custom, and is followed by most planters, and the ditches are cleaned out by some occasionally during the year, besides the leading ditches, and some twice; some of the cross

132 ditches become filled up in places and have to be spaded out, especially after heavy rains and on new ploughed land.

Q. Do you know the Le Branch place?

A. I have been on it several times.

Q. Was it ever overflowed?

A. Not to my recollection; I think it was overflowed a long time since.

Q. Do you know the fact of its being overflowed?

A. Yes, sir; not to my personal knowledge.

Q. How do you know it then?

A. From hearsay; my partner was manager of the place and I was engineer, and assisted him in taking off the crop of the Le Branch place in 1870.

Q. Is it not well known in that community that the Le Branch place was overflowed?

A. Yes, sir.

Q. Do you know whether or not a crop of cane was raised on that plantation in the year following the overflow?

A. I was on the place with my partner in 1870; he was manager and I was engineer, and he told me that he had ploughed 400 or 800 acres, I forget now which.

Q. Do you know the Le Place place?

A. I have been on it several times; I passed through it in the cars in 1883.

Q. Was that place overflowed? If so, when?

A. I never saw it overflowed.

Q. Was it ever overflowed?

A. Well, I believe it was, as much as I believe the Le Branch place was, because of the high-water marks of the overflow on
133 the trees from the Bonnie Carrie crevasse; I judge from those marks that the two places were overflowed.

Q. Tell us whether or not a crop was raised on that place the year after the overflow?

A. The levee was closed in 1882 and in 1883, the spring of 1883; before the water rose more Mr. Le Place ditched and planted cane in the fresh land; the land had not been cultivated on account of water for some years; I saw the cane several times during the year, and saw it in the sugar house when he was grinding the cane; I went there especially to see how the cane would yield and to see what sugar he got.

Q. What was the result?

A. The sugar was very fine quality; how much it yielded I don't know.

Q. By Mr. BUCK: How did the sugar strike you in appearance?

A. The sugar was very fine.

Q. How did the cane look?

A. Very fine.

Q. Was it of the usual size?

A. I thought so.

Q. By DINKELSPIEL: What effect has an overflow on a plantation?

A. I cannot tell you, because I never worked a plantation after an overflow; I never had a plantation overflowed that I was connected with.

Q. But you do know with reference to the Le Place plantation and the Le Branch plantation?

A. Yes, sir; I know that and about assisting my partner on the Le Branch plantation.

134 Q. What was the effect on those plantations?

A. On the Le Branch place there was a portion that was not overflowed, as my partner told me, and a portion that was overflowed; he raised cane on both portions.

Q. What was the yield on the overflowed portion?

A. A good yield; you see I *grinded* the cane and was not there when the cane was planted, but was told by my partner that it was planted on the overflowed portion.

Q. By Mr. BUCK: In what year was that?

A. In 1870.

Q. That was on the Le Branch place?

A. Yes, sir; I did not arrive on the plantation until the middle of September.

Q. DINKELSPIEL: What year were you on the Le Place plantation?

A. In 1883.

Q. You saw the crop on the Le Place plantation?

A. Yes, sir; I was interested in that crop because Mr. Le Place planted it in deposit and I wanted to see the result.

Q. What was the price of open kettle sugar in this market 2 years ago?

A. It depends on the quality.

Q. Such sugar as was made on the Friedlander plantation?

A. Open kettle that classed fully fair was worth from 6 to 6¾ cents per pound.

Q. What is that same sugar selling for now?

A. I have been on the levee several times lately, and I saw sugar that was selling in 1881 & '82 for seven cents now selling for
135 4 & 4½ cents.

Q. By Mr. BUCK: Have you seen the Friedlander plantation lately?

A. I passed there the other morning on the train.

Q. You have not examined it as to the depth of the deposit left by the overflow?

A. No, sir; I examined it simply passing on the Morgan train.

Q. What would you consider as constituting a sugar plantation?

A. There is a great many different grades of sugar plantation.

Q. It is claimed that a sugar plantation that has been under overflow and is left with the ditches filled or partially filled, the canals partially filled, and the bridges washed away and the cane destroyed, — would you consider that a total destruction of a sugar plantation?

A. I should not, because the buildings and the land itself are the two principal features of a sugar plantation; the fact of the ditches being partially filled and the bridges washed away I would consider a very serious objection against a sugar plantation.

Q. The making of ditches for drainage is simply an incident of sugar planting?

A. We are compelled to ditch cane if we wish to make a successful crop, and more so than for cotton; we have to have bridges on a sugar plantation; but all that is not considered if the land is there with the buildings and everything to make a crop.

Q. The digging out of ditches and canals and making bridges would only be a question of repairs?

A. I should think so. If you have a sugar plantation and take

in new land you must ditch and bridge it and keep them in
136 order; I have had bridges wash away in heavy rains; you cannot afford to let a crop of cane go because a bridge is washed away.

Cross-examination by Judge VOORHIES:

Q. Supposing that plantation you speak of was to remain for ten years without stock, without cane, without bridges and ditches on canals, would you call it a sugar plantation?

A. No; you could not call it a plantation; when it is abandoned in that way the plantation would be called an abandoned sugar plantation.

Q. Is it not one of the necessary requisites or elements of a sugar plantation that there should be good drainage and a stand of cane?

A. It is not a sugar plantation if you do not have cane and drainage.

Q. You have spoken of the price of sugar; have you been engaged in buying and selling of sugar as crops?

A. No, sir; I never bought or sold.

Q. Have you kept run generally of the valuation of sugars in the markets?

A. Of course, having the management of plantations I was compelled to know my business.

Q. When you managed plantations?

A. Yes, sir.

Q. Have you managed any plantations since 1882?

A. I managed M. Goodcheaux's plantation in 1883, and in 1884 I managed the Hope plantation.

Q. Did you receive the price currents of sugar every day?

137 A. We received the daily papers and account current sales when we are shipping sugar.

Q. You speak of the Le Place place; how many acres of cane did you see actually ground there yourself?

A. I did not remain on the plantation long enough to see any great amount ground; I simply made a visit to the place.

Q. How many visits did you make?

A. Three.

Q. How long did you stay at each visit?

A. About 4 or 5 hours each time.

Q. In what year did you grind cane of the Le Branch place of which you have spoken?

A. I speak of cane that my partner had there and which I ground in 1870.

Q. Was the Le Branch place overflowed in 1870?

A. No, sir; it was overflowed before the war.

Q. You are certain there was no overflow on the Le Branch plantation in 1870?

A. I am not certain, as I went there in September, 1870; I came from Texas in 1870.

Q. By Mr. LOUQUE: In speaking about the Le Place plantation, you say there are some marks of water, which seemed to have over-

flowed the land; will you please state how long the Bonne Carrie crevasse remained opened which overflowed the Le Place plantation.

A. I think it broke in 1874, and it was closed in 1882 or 1883; it remained open during that time.

Q. Will you please state whether you are able to say that that mark which you saw on the trees was a mark made by the
138 water of 1874 or 1875, or any particular year up to 1883?

A. I cannot say; I only saw marks of water that had been there. I cannot say in what year they were made.

Q. You cannot say where the water went during that period of time?

A. No, sir.

Q. Do you know the land on the Le Place plantation which you say was planted with cane right after the overflow, and made such a good crop?

A. I cannot tell you.

Q. Do you know whether the Bonne Carrie crevasse had for a fact made any deposit on the Le Place place?

A. The deposit looked to me to be 2 feet deep; I noticed where they had cut ditches that it was that deep; I saw the difference by the color of the deposit from the old soil.

Q. Do you know whether the year before or several years before, a few miles further down from the Le Place place, that the Bonne Carriecrevasse made large hills which prevented the water from getting to Le Place plantation?

A. I don't know that.

Q. When you plant cane in new ground it very seldom makes sugar the first year; is that not a fact?

A. Yes, sir; it is generally too green; the second crop is the one that generally makes the sugar.

Q. Will you state whether or not that cane planted in fresh land is not usually cut by worms?

A. I cannot say.

Q. You made the biggest crop on Mr. Viterbo's place that has ever been made?

A. I think so; it was the largest crop ever made.

139 Q. How many pounds of sugar was it?

A. I do not remember now; nearly 2 million pounds; I should have made over 2 million pounds if my sugar maker had not been killed.

Redirect examination by Mr. BUCK:

Q. How deep is cane planted in the ground?

A. It depends when you plant it; whether in the fall or spring. When I plant in the fall I cover much deeper than in the spring; but if you plant, say, in February or March, you cover only 2 inches.

Q. How deep do you plough lands for planting sugar?

A. You never can plough land too deep for sugar; we can only plough about 1½ feet.

Q. No deeper?

A. On sandy land with an 8 mule Aury plough I can plough from 11 to 12 inches.

Q. If you had to plough a plantation that has just been overflowed, where a deposit of 6 inches has been left, would not the ploughing be of such depth as to turn up some of the old soil, and would not the planting be substantially in the old soil?

A. If I had a plantation with a deposit of 6 inches, I would plough as deep as possible, and plant the same as I would plant in old soil.

Q. The planting under these conditions would not be planting entirely in new deposit soil?

A. No, sir; of course not.

Q. So that cane planted in that soil would not come out green and give no sugar?

140 A. I do not think that deposit of 6 inches would make any difference; I think it would make the cane better and sweeter, as it would enrich the soil without making it new ground.

Q. You think the cane would be benefited?

A. Greatly, in my opinion.

Recross-examination by Mr. LOUQUE:

Q. If you had a plantation cultivated in sugar cane would you open the levee and let the water run in and destroy the crop for the purpose of getting 6 inches of deposit on the land?

A. Well, if it was my place, I could not tell you; it would depend whether I was out of depth or not; I should consider that it would benefit the place.

Q. By Judge VOORHIES: Is it to the interest of the lessee of a plantation with some 200 arpents of cane to have it destroyed, with all his bridges swept away, ditches and canals filled, more or less, to overflow the place simply for the purpose of getting 6 inches of deposit on the place?

A. No; I do not think it would be to the advantage of a lessee. I know I would be willing to take the Friedlander plantation as it now is and pay more for it than to have taken it in 1883; I consider it greatly improved from what it was in 1883 in its present condition.

Q. If you were the lessee in 1883 and 1884 how would you consider the loss of 200 arpents of cane, bridges, and ditches, and canals filled; would you consider it a benefit?

A. I would not like it at all; I would consider it a great loss.

Q. Do you think he could make up his loss out of the ben-

141 efit of the deposit to the soil in the crops he would make in 4 following years?

A. Well, I will tell you, in plain English, the loss of that crop was great, on account of the price of sugar. I think he would make more sugar in five years if he cultivates the place vigorously than he would make if the place was not overflowed.

Q. What he would make in those five years would compensate him for the loss of this last crop?

A. Yes. If the price of sugar staid up and if the plantation had been put to work at the proper time he would make more pounds of sugar and better sugar than if the place had not been overflowed.

Q. Then it is positively a benefit to have the destruction of the whole sugar crop, bridges, ditches, and canals, for — prospect of making after crops for 4 or five years?

A. I did not say that. I said it was a great loss to lose a crop, bridges and everything, and the drainage.

Q. By Mr. LOUQUE: When did you cultivate any land which had been overflowed or had a deposit on it?

A. I never cultivated any; but I have cultivated a great deal that I thought I would like to have an overflow on.

Q. That is only an opinion as an *attest* that you have given?

A. Yes, sir; that is my opinion and belief.

Q. By Judge VOORHIES: Have you made any calculations as to what — the probable loss in money by an overflow on any plantation, and have you made a calculation in money of the possible advantage that might follow for 4 or 5 years, upon which you gave your conclusion that it would be of benefit to the planter?

142 A. No, sir; I have never had occasion; I know some plantations that would be damaged by overflow; those are plantations with very sandy land; I never made any calculations.

Q. So that is simply an off-hand opinion you gave on the subject?

A. Yes, sir.

Re-redirect examination by Mr. DINKELSPIEL:

Q. I want to know whether or not, as to your experience, if the Friedlander plantation was benefited by the crevasse?

A. I think it is benefited.

Q. Why?

A. I think so; from the information I have received I understand the whole place was overflowed, and there was a deposit; and, from my knowledge of the nature of the land on the place, I think it greatly benefited by that overflow.

Re-recross by Judge VOORHIES:

Q. You say that the plantation is benefited; you mean to say the drainage is benefited?

A. No, sir.

Q. Do you mean to say the bridges have been benefited?

A. No, sir; artificial work is liable to be damaged, but that is a very small item.

Q. Do you [mean] the cane that has been destroyed has been benefited?

A. No, sir; that is a loss which can be replaced.

Q. When you say that sugar plantation is benefited you simply mean that the land is enriched?

143 A. Yes, sir; I regard the land the main foundation of a sugar plantation; you have to fertilize old lands every year with fertilizers; therefore the Mississippi fertilizes your land, and it lasts for years—not for one year. What is the cleaning of a few

ditches and building of a few bridges in comparison to the benefit derived from it?

Q. You mean the land is enriched?
A. Yes, sir; enriched.
Q. Nothing else but that?
A. No, sir; nothing else.

P. S. PERRET sworn for defendant.

Direct examination by Mr. DINKELSPIEL:

Q. What is your business?
A. I was always an overseer.
Q. Overseer of what?
A. Sugar plantation.
Q. Do you know the Friedlander plantation?
A. Yes, sir.
Q. In what capacity?
A. I have worked it for Mr. Friedlander for 8 or 9 years.
Q. As what?
A. Overseer.
Q. From what time?
A. From 1875 to 1883.
Q. Who took charge of it in 1883?
144 A. Mr. Viterbo.
Q. Describe as close as possible the condition of the Friedlander plantation when you delivered it to Mr. Viterbo?
A. The plantation was in a very bad condition, not much ditches, no canal or drainage; I have *been* asked for a canal, but — never wanted to give me one; I was fighting for 8 or nine years for that canal.
Q. When did you see the plantation last?
A. Since the crevasse.
Q. Describe its condition when you last saw it.
A. The 15 of Nov. last I saw it and found the plantation was greatly improved from what I left it in Sept., 1883.
Q. How was it improved?
A. The canal I need so much was made, and the land was opened in some places; the lower canal was fixed up; there were plenty of ditches to drain the land.
Q. That was after the overflow?
A. Yes, sir.
Q. Would it require more or less work to put that place into cultivation in order to make a crop than at the time Mr. Viterbo took charge of it?
A. No, sir.
Q. Would it require less?
A. Yes, sir.
Q. Why?
A. Because there is the canal made already, which only needs to be cleaned, and for the dams to be taken out, which were put there to keep the water from coming on the place through the canals.

Q. Have you ever had any experience in planting cane
145 after an overflow?

A. No, sir.

Q. Have you seen any crops made the year following on an overflowed plantation?

A. No, sir.

Q. By Mr. BUCK: Did you have occasion to examine the ditches and canals in regard to how they were effected by the overflow?

A. I went over the place and there was a great deal of deposit in the ditches; and I found the deposit was the most in the places where it was needed in the low places.

Q. What is the deepest deposit on the plantation?

A. On the Morgan side, about 50 acres from the river, it is about from 4 to 5 inches deep; maybe some places as much as six inches.

Q. To what extent, if any, were the canals injured by the crevasse?

A. I found the canals had water in them which was running when I was there; there were some dams in the canals which can be easily taken out.

Q. What were those dams for?

A. They were put there to prevent the water from coming from the crevasse onto the plantation.

Q. How high are those dams?

A. They are *more high* than the canals.

Q. What kind of bridges were there on the plantation when Mr. Viterbo took charge?

A. I left bad bridges; what bridges I had were made out of pickets I cut in the woods, and they were old and not of much good.

146 Q. What is generally used to make bridges?

A. Common planks; those bridges I made were made out of pickets which I got out of the woods. I understand Mr. Viterbo had very good bridges. I delivered the place to him on September 29th and went on the place on a visit on the 15th of Nov. next year.

Q. If those bridges of Mr. Viterbo's had been taken up and put away before the crevasse, could not the lumber and boards be used to reconstruct them?

A. Yes, sir; the bridges could have been staked and tied and they would have been saved. I had to do that when it rained very hard to keep my bridges from floating away, and if they should float away before I staked them I hauled them back to their places.

Q. Is there any physical or natural reason from the condition in which the plantation now is why a crop of sugar cane could not have been planted for the year 1885?

A. There is no reason at all why a crop could not have been planted for 1885.

Cross-examination by Mr. LOUQUE:

Q. How long have you been an overseer?

A. Since 1853, and take off from that three years during the war,

and from the war to 1883 I was an overseer until 1883, when I went on my own place.

Q. How many overflowed plantations were you on during that time?

A. I was not on any. I took care of a plantation in 1854, but the crevasse was on it before that.

147 Q. How do you know the effect of a crevasse on a sugar plantation if you have not been on one when it was overflowed?

A. Because I have worked sandy land and it is the same as a place what has been overflowed?

Q. Do you know whether or not the working of a fresh deposit from the river is the same as the working of sandy land?

A. A light deposit mixed with stiff land makes a good middling land.

Q. Since you have never cultivated any overflowed land yourself, I will ask you what is the effect on the plants which are planted in what is called fresh land?

A. It won't be any fresh land when there is only a deposit of 4 inches. I don't call that new land and it will not change the nature of the land.

Q. Would you, in the condition in which that plantation is today, without digging the ditches any more and leaving the canals as they are, plant a crop of cane on that place?

A. You cannot plant cane where there is no ditches.

Q. Would you plant cane on that plantation in its present condition?

A. In some places I would.

Q. Could you do it all over the place?

A. On more than ½ of the place I could.

Q. Why?

A. Because there was no better ditches there when I had charge of the place and I made a crout of cane.

Q. Why would you not plant cane on that plantation in its present condition?

148 A. I would not plant cane behind the Morgan R. R., because there is more sand and the ditches are filled up; but in front, where Mr. Viterbo has made ditches and a canal I would plant cane, because it is in better condition now than it was when I made a crop on it just before I left.

Q. Did that crop you made give a good yield of sugar?

A. No, sir; not very good, because I never had enough drainage.

Q. So you did not make a good yield of sugar because you did not have good drainage?

A. I did not have any drainage at all.

Q. You say, then, that the drainage you had on the place was not good?

A. No, sir; it was not.

Q. Therefore, you did not make the quantity of sugar that your cane ought to have yielded you?

A. No, sir; I did not.

Q. Therefore your crops were failures?

A. Yes, sir; not failures exactly; they were not very good.

Q. Mr. Viterbro has dug a canal in the middle of the plantation which it had not when you had charge?

A. Yes, sir.

Q. And this canal, although it is partially filled with sand, draws water better than the canal you had?

A. Yes, sir; I had only a ditch there, no canal.

Q. Then what would now prevent you from planting the whole of the plantation in cane?

A. Without canals I could do it, but not without ditches;
149 on some of the land behind Morgan R. R. there is no ditches.

Q. You would not plant where the ditches were filled up, but plant where they were not filled up?

A. Yes, sir.

Q. Do you know whether or not that cane planted on new ground cannot make sugar; is that not a fact?

A. That depends how you plant it.

Q. How could you make it yield sugar?

A. If you plant all cane you will not make as much sugar, but if you plant every 2 acres with corn and get the sun on the cane you will make sugar.

Q. Then you would have one-half of your place not planted in cane?

A. I mean when it is in entire new ground; I do not mean on the Friedlander plantation, because that is not new ground.

Q. In the first place, if you would cultivate in the way which you say one-half of the land would be planted in sugar cane?

A. Yes, sir; and you would have to cut the cane lower.

Q. How much lower?

A. About $\frac{1}{3}$ of the cane.

Q. So that would reduce your crop considerably?

A. No, sir, because that $\frac{1}{3}$ I would keep for seed.

Q. Is green cane good for seed?

A. Yes; it is better for seed than ripe cane from my experience.

Q. By Judge VOORHIES: So in your belief the drainage of the Friedlander plantation now is in better condition that it was when Mr. Viterbo got it from Mr. Friedlander?

150 A. Yes, sir.

Q. You say that positively?

A. Yes, sir.

Q. You say that for the several years that you had that plantation your crops were failures?

A. Not failures exactly; I did not make the crops I ought to have made.

Q. They were failures to a certain extent?

A. Yes, sir.

Q. What you wanted badly was drainage?

A. Yes, sir.

Q. Then the want of drainage on that plantation prevented you from making such crops as you should have made?

A. Yes, sir.

Q. Did you not make very small crops?

A. No, sir; not exactly.

Q. How many acres of plant and stubble cane did you generally cultivate on that plantation?

A. I was cultivating 265 acres of cane in stubble and plant.

Q. How many hogsheads of sugar have you made from that?

A. I have made about 150 hogsheads.

Q. Out of how many acres of cane did you get that?

A. Some years out [of] 175 acres and some years out of 200 acres.

Q. As a sugar planter, is it not a decided failure to make only 150 hogsheads of sugar out of that many acres of cane?

A. If you ground all the good cane it was a failure; when I say 200 acres it was not worth 200 acres of good cane.

Q. You stated that the failure to make a good crop was caused by your drainage?

151 A. Yes, sir.

Q. Therefore, if your drainage was not sufficient and caused your cane to be poor and 200 acres to yield only 150 hogsheads of sugar, it was a failure?

A. Yes, sir.

Q. Drainage is the most necessary thing in sugar planting, is it not?

A. Yes, sir.

Q. And cane requires a great deal of drainage?

A. Yes, sir.

Q. And it requires bridges to cross the ditches?

A. Yes, sir.

Q. You cannot do anything without bridges?

A. Bridges are not a principal thing.

Q. Are they not indispensable?

A. Well, the only time you want bridges is when you cut the cane and bring it to the sugar house, and you can move the bridges where you need them.

Q. They are not indispensable then?

A. They have to be had, but that don't amount to much.

Q. You say that there is better drainge to-day than when you delivered it Mr. Viterbo?

A. Yes, sir.

Q. Was there enough drainage when you delivered it?

A. No, sir.

Q. Was there sufficient drainage when you were there?

A. No, sir.

Q. Was that not the cause of your short crops?

152 A. Yes, sir; there was no drainage.

Q. By Mr. LOUQUE: Would you have to dig any more ditches now on that plantation to cultivate it?

A. You would have to dig some ditches, but the canals would make out very good.

Q. By Judge VOORHIES: Other witnesses have testified that the ditches were filled with sand; is that so?

A. No, sir; I never saw that.
Q. Did you examine all of them?
A. I went over the place on Nov. 15th, 1884.
Q. And you say the ditches were not filled up?
A. I saw some places — there was a little deposit.
Q. By Mr. LOUQUE: Is the drainage to-day in better condition than it was just before the crevasse?
A. It is better for one reason; the crevasse has cleaned the place of all trash and left it in better condition.
Q. Did not Mr. Viterbo make other ditches besides the ones that you left there?
A. I never went over the place; I only saw the canal.
Q. You know what ditches you had?
A. Yes, sir.
Q. Did he cut any other ditches?
A. There was no ditches to cut; but I do not know; I did not notice.

153 Q. Will you explain what you mean when you say that the bridges could have been saved and brought back?
A. I was on this side of the crevasse, and I did not think the current was so strong as to prevent the catching of the bridges with skiffs; other planters saved their bridges and fences that way.
Q. Mr. Viterbo made new bridges when he took charge of the place?
A. Yes, sir.

Redirect examination by Mr. BUCK:

Q. I understand you to say that you saw planters catching their bridges?
A. Yes, sir; on this side of the crevasse they were catching their bridges and timber and bringing them to high ground; and on the other side of the crevasse, I suppose, they were doing the same thing.
Q. Where the plantations were overflowed you saw the planters with their skiffs catching their bridges?
A. Yes, sir.
Q. The plantations you speak of were overflowed by the Davis crevasse?
A. Yes, sir.

154 Recross-examination by Judge VOORHIES:

Q. How do you know that the water did not rise so fast as to prevent the saving of the bridges?
A. The water rose on the outside of the levee; they had to protect the place, and that levee broke and let the water in, and it ran all over the place.
Q. How do you know but that the water came direct to the sugar house?
A. I don't know; it came from behind.
Q. You mean to say that the water did not come in a direct line to the sugar house?

A. It went all around and broke in at the sugar house; the current was more strong below than above.

Q. Can you swear that the water that passed through the Davis crevasse did not go from the crevasse to the sugar house of Mr. Friedlander in a direct line?

A. I don't know; I know the water came from the crevasse; that is all.

Q. Were you present at any time in the vicinity of the Friedlander when the crevasse broke into that plantation?

A. I was there the same evening.

Q. How long did you stay there?

A. A few hours.

Q. Were you there when it broke in at the sugar house?

A. I was not on that plantation; I was on my place when it broke, but went on the place a short time after.

155 Q. By Mr. BUCK: How far is the Friedlander plantation from the front where the Davis crevasse broke?

A. About ¾ of a mile.

Q. From your knowledge of the surroundings of the Friedlander plantation, when that levee broke, was there at any time such a current of water over the plantation that it would be impossible for a boat to go and save the bridges?

A. No, sir.

Q. When was the last time you saw the Friedlander plantation?

A. 15th of last November.

Q. Have you been trying to see it since?

A. I went there last Sunday.

Q. Did you go over the grounds?

A. No, sir.

Q. Why?

A. I went to the front gate, and it was locked and the watchman was there, and I asked [him] to let me ride over the place, and he told me he had special instructions not to allow anybody on the place.

Q. Did that watchman know you?

A. Yes, sir; he worked for me as my stable man for a long time.

Q. He refused you permission to go over the ground?

A. He told me he had special instructions not to let anybody on the place.

Q. By Mr. DINKELSPIEL: Have you ever had partial overflows that carried away your bridges?

156 A. No, sir; not from the river; they have been floated away in heavy rains.

Q. In heavy rains?

A. Yes, sir.

Q. And you put them back again?

A. Yes, sir.

Q. What is the name of this man that refused to let you visit the place?

A. Thomas Abvao.

Q. Do you know if he is employed by Mr. Viterbo?

A. He works for Mr. Viterbo. He worked for me first, and I left him as stable man on the place and Mr. Viterbo took him.

Q. How long have you been connected with sugar planting?

A. I commenced when I was 15 years old, and I am now 49—34 years.

Q. Principally on the Mississippi river?

A. Yes, sir.

Q. The sugar plantations in Louisiana are those that front on the Mississippi river?

A. Yes, sir.

Q. How are they protected from the Mississippi?

A. By levees.

Q. Is not the land of the sugar plantations below the Mississippi river?

A. When the river gets high they are.

Q. And the levees protect them?

A. Yes, sir.

Q. So nothing protects the plantations from annual overflow except the levees?

157 A. Yes, sir; that is the only protection.

Q. If the levee breaks then there is an overflow?

A. Yes, sir.

Q. Is it not probable for those overflows to happen at any time?

A. Yes, sir.

Q. How many overflows of the plantations of Louisiana do you know of of your own knowledge that have happened within the last thirty years?

A. We had several big crevasses that I know of. The Bell crevasse, the Bonnie Carrie crevasse, and a crevasse in Poinqupee, and the Davis crevasse, and a great many others that I do not know of personally.

Q. Is it not a fact that the country is in constant danger of overflows and the only protection are these levees?

A. Yes, sir.

Q. If the levees give away there is an inundation of the land behind them?

A. Yes, sir.

Q. How wide was the Davis crevasse?

A. About 800 feet.

Q. That is from the break in the levee?

A. That is from the break in the levee; it is my estimation.

Q. What is the utmost depth?

A. I do not know the depth; it is very deep.

Q. What was the least width?

A. It broke about ten feet and commenced running until it got uncontrollable.

158 Q. How often did you see that crevasse?

A. Often.

Q. In what direction did the current go?

A. The current went below.

Q. Below where?

A. Below the Davis place.

Q. In what direction in regard to the Mississippi river?

A. It followed the prairie, and, when that got full, it filled up the plantations.

Q. In what direction in regard to the current of the Mississippi did the waters of that crevasse run?

A. It flowed off across the prairie.

Q. In what direction was that current flowing in regard to the Friedlander plantation?

A. It flowed back, and, when the prairie filled up, the water spread, and the levee around the plantation could not stand and it gave away. I went there just before it broke and told the colored engineer that it would be impossible for the levee to stand.

Q. You saw that plantation just before the crevasse got on it?

A. Yes, sir; I saw the colored engineer and told him it was impossible to save the plantation.

Q. It was not covered with water then?

A. No; the water came on a short time after I left.

Q. How near to the Friedlander plantation was the water at that time when you spoke to the engineer?

A. The water before the levee broke was just a little behind the sugar house.

Q. From what direction did the water strike the protection levee?

159 A. Struck it right in front of the sugar house.

Q. In what direction was the water coming from?

A. Right in the direction of the sugar house.

Q. It came from the river?

A. No; it came from behind.

Q. Was the break in the levee on a line with the main current of the crevasse?

A. The water of the crevasse came one way and the water that was spreading over the land came another way.

Q. The water first spread over the land and then came against the Friedlander plantation?

A. Yes, sir.

Q. It did not reach the protection levee from the main current of the crevasse, but from back water?

A. Yes, sir.

Q. From these circumstances, then, the water that finally covered the plantation could not have rushed on it with such violence that it was impossible to save with skiffs the bridges on the plantation?

A. Yes; they could have saved them while they were working on the levee and before the levee broke.

Q. Was the current of the water through that break violent and rapid?

A. I don't think it could have been very violent or rapid; it just ran in, but not very violently.

Q. By Mr. LOUQUE: When did you leave the plantation of Mr. Friedlander?

160 A. 29 September, 1883.

Q. When did you go there the next time?

A. I was there a few days after the crevasse broke; I believe the 15 or 20 March.

Q. How far did you go?

A. Right down on the line of the Friedlander and Lone Star place, where the pump was.

Q. How far from the river?

A. About 18 or 20 acres.

Q. How long did you stay there?

A. About ½ hour.

Q. When did you go on the Friedlander place after that?

A. On 15th November.

Q. How do you know there was no current through the break in the protection levee when you was there before it broke, and then not until the 15th November?

A. When I was there there was no current of water, and the pump was running and the levee had not been given up.

Q. How do you know anything about the current, as you have not been there?

A. I never went there after it broke; I do not know.

Q. Then you do not know whether they could have saved the bridges or not?

A. I said they could have picked them up with skiffs.

Q. Were you present to see if it was possible to pick them up with skiffs?

A. No, sir; I was not there.

161 Q. You were not there and do not know anything about it?

A. No, sir.

Q. By Judge VOORHIES: You have been testifying as to the possibility and feasibility of saving the bridges and having skiffs for that purpose, and speaking of the current at the sugar house; now, have you been speaking of things you saw yourself?

A. I went there.

Q. By Mr. LOUQUE: Is there not a ridge in the middle of Mr. Friedlander's plantation?

A. Mr. Friedlander had a little ridge in the middle of his plantation; I do not call that a ridge.

Q. How high is it?

A. I suppose about one foot; the —.

Q. How far across the plantation does that elevation extend?

A. That is the road to go to the Edmee plantation.

Q. On the other side have you not the same ridge?

A. No, sir.

Q. Did you inquire of this man who refused you admittance upon what authority he refused you admittance?

A. Yes, sir; he said Mr. Viterbo told him not to let anybody go over the place.

Q. Did you enquire the reason why he would not let you go on the place?

A. I asked him to let me ride over the place, and he told me he had instructions not to let anybody go over the place.

162 Q. Did you tell him what you wanted?
A. I told him I wanted to take a ride over the place.
Q. At whose request were you going to take a ride there?
A. I went for myself, because I was passing, and as I would like to inspect the plantation, as they are talking about it.
Q. Did you inquire for Mr. Viterbo?
A. I know his cousin, Mr. Leon Viterbo, and I only know Mr. Viterbo by sight.
Q. Did you have any objection to inquire for Mr. Viterbo, to see if this man was telling the truth?
A. I never asked him any questions; he had the gate locked, and I went away.
Q. Did he have the key?
A. I suppose so; I do not know.
Q. By Mr. BUCK: You did not see Mr. Viterbo?
A. No, sir.
Offer: Mr. Buck offers in evidence the letter annexed to the case.
Admission: It is admitted by both parties that the letter just offered by Mr. Buck was received by Mr. Locque.
Offer: Mr. Buck further offers in evidence all the exhibits annexed to the answer of defendant.

THOMAS ABRIO sworn for complainants.

Direct examination by Mr. LOUQUE:

163 Are you acquainted with Mr. Perret?
A. Yes, sir; I worked for him.
Q. For how long?
A. I worked for two years for him.
Q. How long did you know him before that?
A. I knew him 3 or 4 years before that.
Q. On what terms of familiarity are you with him?
A. I look upon him the same as a father; I am on the best of terms with him.
Q. Did Mr. Perret go on Sunday to the Friedlander plantation and ask you permission to visit the plantation?
A. Yes, sir.
Q. What took place?
A. I told Mr. Perret to ask Mr. Leon Viterbo the permission to go on the place.
Q. What did Mr. Perret say?
A. He answered that he did not want Mr. Viterbo to know that he came on the plantation.
Q. For what reason?
A. I do not know.
Q. Was there anything said about Mr. Friedlander?
A. He said he would inform Mr. Friedlander that he was not allowed to visit the place.
Q. Did Mr. Perret see Mr. Viterbo and ask permission to examine the plantation?

A. No, sir.
Q. What did he do then?
A. He left and went to Boutte station.
164 Q. Then what took place between you and Mr. Leon Viterbo?
A. About two hours after, which was about 4 o'clock, Mr. Perret came back from the station and I told him that Mr. Leon Viterbo said he could go and visit the plantation if he chose; Mr. Perret said it was too late, and that he would not go.
Q. Did Mr. Leon Viterbo send you to wait for Mr. Perret in order to so inform him?
A. Yes, sir; I waited here.
Q. At the station?
A. I went to the station; he was not there, and Mr. Leon Viterbo told me to waite for him and tell him to go and examine the place, and I did so.

LEON VITERBO recalled for complainants:

Q. Will you please state what happened in relation to the visit of Mr. Perret on Sunday last to the Friedlander plantation?
A. Sunday, at two o'clock, that man Thomas Abrio came to me and told me that Mr. Perret asked to go onto the plantation, and that he did not give him permission to go in; I asked him if he knew where Mr. Perret had gone, and he said to Boutte station, and that he had told Mr. Perret he would ask me permission to let him go on if he would wait, and that Mr. Perret did not wait; I told him to go and get Mr. Perret and tell him to go on the plantation and do as he pleased; he came back and told me that he saw
165 Mr. Perret, and Mr. Perret told him it was too late.

Cross-examination by Mr. DINKELSPIEL:

Q. Prior to this did you instruct Thomas to refuse permission to go on the place?
A. A long time ago I did.

Exception to Master's Report. Filed May 4th, 1885.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667. In Chancery.

Complainant, Richard Viterbo, begs leave to file this his exception to the report filed herein on 17th April, 1885, by the master in chancery, and he avers:

1st. That said report was unlawfully filed herein for this, that no copy of the same had ever been previously submitted to said complainant or to his solicitors; that no service or warrant thereof has ever been served on them; that no opportunity has ever been afforded to them, or either of them, to examine or know the contents
166 of said report before its filing in this court; that had they had an opportunity of examining the same they would have

availed themselves of it, and would have filed in due time specific objections to the same before the master both as to matters of fact and of law, and they now signify their readiness to appear before said master, and in due course to file a written statement showing in what respects the facts have been wrongfully stated in said report and the law misapplied to the pleadings as well as to the facts.

2nd. That among other objections which they would have filed had they had an opportunity, and which they now prefer, are the following:

First. That said report ignores the clause in the lease by which the lessee bound himself to plant in 1884 on said Friedlander plantation all the standing cane of the year 1883, and the report erroneously considers that this standing crop of cane was given in exchange for another crop to be delivered by said lessee to said lessor at the expiration of said lease.

Second. That said report ignores the fact that after the subsidence of the overflow in 1884 there was no possibility of raising a crop on said plantation, and loses sight of the fact that in this contract of lease, and indeed under the express law of Louisiana, leases of predial estates are by the year, and that it was the duty of said lessor to see during the whole year 1884 the said leased premises in a condition such as to serve for the use for which it is hired, *i. e.*, a sugar plantation.

Third. That said report erroneously holds that defendant as lessor does not warrant the enjoyment by the said lsssee under the
167 terms of the lease and in accordance with the law on the subject-matter.

Fourth. That said report ignores the fact that said leased premises were destroyed as a sugar plantation during the year 1884 by the total destruction of the stubble cane and of the plant cane in the ground by the filling up of the ditches, sweeping away of all the bridges, materially impairing and partially destroying the canals, covering the whole land with deposits of sand, and reducing the whole from a cultivated sugar plantation to waste land.

Fifth. That said report erroneously considers the destruction of the land itself as necessary for the destruction of the leased premises as a sugar plantation.

Sixth. That said report erroneously holds that what had been leased was land, while that which was destroyed was growing crop which was not leased.

Seventh. That said report erroneously states that the thing leased was not destroyed totally or partially, ignoring the state of facts specially set forth in the above clause numbered "Fourthly."

Eighth. The report erroneously, and as to lessee ironically, avers that the inundation was a benefit to the plantation by enriching or fertilizing the land or soil, and that in equity this lessee cannot complain of the loss of the stubble cane, of the plant cane in the ground, of the bridges, of the ditches, and canals, although he has certainly lost the crop of 1884, cannot have stubble cane for two years, cannot within less than three years reinstate said plantation

in its former condition unless upon considerable expense, and that too in face of a lease for a limited number of years.

168 Ninth. That said report is defective in not finding the fact that without any fault of lessee the leased premises have not been "maintained in a condition such as to serve for the use for which it was hired;" that without any fault on his part he has not been able to enjoy the leased sugar plantation according to the use for which the parties had contracted, and that said lessor has taken no step whatever to enable said lessee to enjoy said leased premises for the balance of the lease, although put in default for that purpose.

Tenth. That said report erroneously assimilates the action to abate rent with the one to annul the lease itself, and illogically concludes that the said lessee, not being entitled to diminution of price *a fortiori*, cannot revoke the lease.

Eleventh. That said report erroneously quotes the laws and authorities specially applicable to abatement of rent, for the purpose of determining the question of revocation of lease, to which said authorities and laws are wholly inapplicable.

Twelfth. That the case of Vinson *vs.* Graves, 16 A., 162 (which is correct in law), applies exclusively to abatement of rent, but is constantly misapplied in said report as an authority on the subject of revocation of leases.

Thirteenth. That the term "unforeseen" in C. C., art. 2697 (2667), is a loose translation of "*cas fortuit*" in the French text, which French text must prevail as firmly established by our jurisprudence. And it means, as defined by C. C. 3556 (3522), "that which happens by a cause which we cannot resist." But in said report this definition

169 is wholly ignored, and it is there repeatedly and erroneously held that "*cas fortuit*" or "unforeseen event" *as* synonymous expressions, meaning an event which the contracting parties might have had in view at the date of the contract.

Fourteenth. That said report ignores the law which allows the action of revocation of leases when the use of the leased premises has been much impeded; that said report fails to find that complainant has not had any enjoyment of the said sugar plantation from the date of said inundation up to the fall of same year, and indeed up to the close of said year, and that the use of it, which had been there impeded, absolutely continued and continues to be much impeded, as more fully stated above in paragraph numbered "fourth," and that the replacing of stubble cane and plant cane aforesaid has been impossible heretofore, and that in consequence of all of said events said lease has become worthless to complainant — said sugar plantation have ceased to be in a condition such as to serve for the use for which it was hired.

Fifteenth. That said report erroneously holds that the stubble and plant cane in the ground at the time of the said inundation did not form an integral part of said Friedlander plantation, and was not, as such, subject to the warranty of the lessor. That under the Louisiana law the said crop in the ground was *quoad* the lessor, part component of said immovable, and its destruction was a partial destruction of the plantation *quoad* the said lessor and owner, and that

its said partial destruction by *cas fortuit* gave to complainant the right to ask the revocation of the lease when taken in conjunction with the destruction of the drainage and of the bridges, and the reduction of a highly cultivated sugar plantation to mere waste lands.

170 Sixteenth. That there are distinct rules of law regulating the abatement of rent by reason of diminution or loss of crop which are inapplicable to the action to revoke the lease; but that the said report erroneously applies these very rules which regulate exclusively the matter of abatement of rent to complainant's demand for dissolution of lease aforesaid to which they are wholly inapplicable.

Seventeenth. That said report erroneously and illogically concluded that there was no partial or total loss or destruction of said leased premises; that the damages proven were not done by "*cas fortuit*," which the master confounds as synonymous with "unforeseen event;" that said leased premises are suitable now, as before, for cultivation as a sugar plantation, notwithstanding the destruction of the whole plant and stubble crop in the ground, of the bridges and of the whole drainage, and the transformation of a highly cultivated sugar plantation into waste lands by the heavy deposits of sand, and that said drainage and bridges are but incidents of cultivation.

Eighteenth. That said report is too comprehensive and actually usurps the functions of this hon. court, leaving nothing for the action in the pending litigation.

Nineteenth. That said master has refused to hear divers witnesses upon matters as to which complainant interrogated them, and allowed same and other witnesses to testify to matters which complainant objected to as inadmissible, to the rulings of which complainant objected and had his objection noted down.

Wherefore (reserving the right to make additional specifications in the premises and to plead additional grounds of opposition to said report) complainant prays that said report be remanded

171 to said master to be dealt with in due course of proceedings so as to allow complainant an opportunity to urge before said master the said and other objections for the purpose of obtaining a modification of said report, so as to make it conform with the facts of this case and with the law applicable to said facts; or should this hon. court decline to remand said report to said master, then that said report be rejected and held null and void; prays for general relief and as in duty bound.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES,
Solicitors.

Submission.

Extract from the Minute-Book, April Term, 1885.

NEW ORLEANS, TUESDAY, *May 26th*, 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

R. VITERBO
vs.
SAMUEL FRIEDLANDER. } No. 10667.

This cause, as continued from yesterday, came on further to be heard on the master's report herein, and on the exceptions thereto, and, after hearing of arguments from counsel for the respective parties, was submitted, when the court took time to advise.

172 *Decree. Entered and Filed 4 June,* 1885.

U. S. Circuit Court. In Equity.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

This cause came on to be heard and was argued; whereupon, the court being advised, it is ordered, adjudged, and decreed that the exceptions filed by the complainant on May 4th, 1885, to the report of A. G. Brice, master, which was filed on April 17th, 1885, be overruled and said report approved and homologated. It is further decreed that complainant's bill of complaint be dismissed with costs.

(Signed) DON A. PARDEE, *Judge.*

Rehearing Refused.

Extract from the Minute-Book, April Term, '85.

NEW ORLEANS, SATURDAY, *June 27th,* 1885.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

This cause came on to be heard on the motion of the complainant for rehearing on the decree confirming master's report
173 and giving judgment in favor of defendant against complainant and was argued by counsel; on consideration whereof it was ordered that said motion be denied and overruled and a rehearing be refused.

Petition for Appeal. Filed July 3rd, 1885.

To the hon. justices of the circuit court of the United States for the eastern district of Louisiana.

The petition of Richard Viterbo, complainant in the matter of Richard Viterbo *vs.* Samuel Friedlander, No. 10667 of the circuit court of the United States for said district, with respect represents:

That on the 27th June, 1885, final judgment was rendered against complainant's demand to set aside a lease of five years at a yearly rent of five thousand dollars; that complainant considers himself

aggrieved by said decree and desires an appeal, with supersedeas, to the Supreme Court of the United States.

Wherefore he prays to be allowed an appeal on said decree or judgment, returnable to the Supreme Court of the United States at its next regular term, on furnishing bond and security, as required by law, in an amount to be fixed by this hon. court, and that said appeal operate as a supersedeas upon said bond being filed within the legal delays, and that defendant be cited.

174 Prays for general relief, and as in duty bound, etc.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES,
Solicitors for Complainant.

Order.

An appeal returnable at the next term of the Supreme Court is allowed in this case on bond of $250.

July 3rd, 1885.

(Signed) DON A. PARDEE, *Judge.*

Bond for Appeal. Filed July 9th, 1885.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Richard Viterbo, as principal, and Fred. Eyle, New Orleans, as surety, are held and firmly bound, jointly and severally, unto. S. Friedlander and the clerk of this hon. court in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said obligees, their heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and

175 dated the 6th day of July, in the year of our Lord eighteen hundred and eighty-five.

Whereas, the said R. Viterbo having heretofore, to wit, on the 3d day of July, 1885, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 27th day of June, 1885, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of R. Viterbo *vs.* S. Friedlander, No. 10667, of the docket thereof:

Now the condition of the above obligation is that if the above bounden principal shall prosecute his said appeal to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

(Sig.) R. VITERBO. [L. S.]
(Sig.) FRED. EYLE. [L. S.]

Signed, sealed, and delivered in the presence of—
(Sig.) CH'S LOUQUE.

Approved.
(Sig.) ALECK BOARMAN,
U. S. Judge.

UNITED STATES OF AMERICA,
Eastern District of Louisiana, } ss:

Personally appeared Fred. Eyle, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the p'sh of Orleans, and is worth the full sum of two hun-
176 dred and fifty dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) FRED. EYLE.

Subscribed and sworn before me this 9th day of July, 1885.

(Signed) E. R. HUNT,
Commissioner U. S. Circuit Court, Eastern District of Louisiana.

177 *Petition for Rehearing.*

In Chancery.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

To the hon. justices of the United States circuit court for the 5th district, State of Louisiana:

The petition of Richard Viterbo, complainant in the above-entitled cause, with respect, represents:

That he considers himself aggrieved by the judgment of this hon. court, overruling his exception to the master's report, rendered — June, 1885; that said report is contrary to the law and the facts of the case, and so is the decree of this hon. court thereon; that the several objections specially set forth in said exception to the master's report are well founded in fact and in law; that the evidence shows that the leased premises considered as a sugar plantation were wholly lost and destroyed; that, to say the least, there is abundant proof of the partial alteration and destruction of said leased premises; that the complainant has been and is much impeded in the use of said leased premises, so much so as to defeat the purposes of said lease; that said lessor has failed in his warranty that complainant should enjoy said leased premises during the continuance of said lease, and that consequently complainant is entitled to a dissolution of the lease; but should that remedy be denied him, then claims indemnity, by diminution of rent and compensation for damages, to the extent indicated by the proof on file in this case.

Wherefore complainant respectfully prays for a rehearing in the premises with the view of granting him the remedy which he seeks in equity.

Prays for general relief. And, as in duty bound, etc.

(Signed) CH'S LOUQUE,
(Signed) ALBERT VOORHIES,
Solicitors Comp.

178 UNITED STATES OF AMERICA.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 176 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Richard Viterbo *vs.* Samuel Friedlander, No. 10667 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 19 day of August, A. D. 1885.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 19 day of August, A. D. 1885.

DON A. PARDEE, *Judge.*

179 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Samuel Friedlander, New Orleans, Louisiana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a petition for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein R. Viterbo is complainant and Samuel Friedlander is defendant, to show cause, if any there be, why the judgment rendered against the said R. Viterbo, as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

ALECK BOARMAN, *Judge.*

[Endorsed:] United States circuit court, eastern district of Louisiana. No. 10667. R. Viterbo *vs.* S. Friedlander. Citation.

180 *Marshal's Return.*

Received Jul. 30th, 1885, by the U. S. marshal, and on July 30th, 1885, I served a true duplicate of this the original citation of appeal, together with an accompanying petition and order of court thereon, on the within-named Samuel Friedlander, defendant herein, by delivering the same to him in person, in the city of New Orleans, eastern district of Louisiana.

J. R. G. PITKIN,
U. S. Marshal East. Dist. of Louisiana,
By E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and make oath that he served a true duplicate copy hereof, and an accompanying copy of petition and order thereon, on the defendant within named, as set forth in his official return hereof.

E. S. CURRY,
D'y U. S. Marshal.

CLERK'S OFFICE.

Sworn to and subscribed before me, this 30th day of July, 1883.
[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

H. J. CARTER,
Deputy Clerk United States Circuit Court, Fifth Circuit, and Eastern District of La.

181 *Opinion.*

United States Circuit Court, Eastern District of Louisiana. In Equity.

R. VITERBO
vs.
S. FRIEDLANDER. } No. 10667.

This cause was, on application and consent of both parties, referred to one of the masters of this court. His report covers all the issues in the case, and seems to be in acord with the evidence. His findings are as follows:

1. That the property leased was not destroyed.
2. That the loss of the growing crop, the partial filling of the canals and ditches, and the washing away of the bridges were not caused by an unforeseen event.
3. That the plantation is as suitable for cultivation as a sugar plantation, if not in better condition, as it was prior to the overflow, and that the clearing of the canals and ditches and the repairing of the bridges are indicents necessary to the cultivation of a sugar plantation.
4. That equity can give no relief to complainant, and that his bill should be dismissed with costs.

The exceptions filed attack the entire report, and conclusions and

the arguments in support of the exceptions cover the entire issues between the parties. As to the amount and extent of the damage resulting to the leased property by the crevasse and consequent overflow, there is little if any dispute, either in evidence or in argument. The plant and stubble cane was destroyed, the ditches
182 were some partially and some wholly filled, and the bridges generally swept away. The water remained over the land until July, and when the water retired a deposit of sand was left over the land of from three to six inches. To cultivate the place as a sugar plantation the following year, 1885, would require the cleaning out and reopening of the ditches and canals, the replacing or rebuilding of the bridges, and the obtaining and planting of seed cane, all of which would require considerable outlay and expense, particularly if the plantation should be put in the condition it was in at the date of the crevasse.

So that if we dispose of the conclusions of the master we dispose of the case.

1. The thing leased is described in the notarial act of lease as "a certain sugar plantation, situated in the parish of St. Charles, in this State, known as Friedlander's plantation * * * and with said plantation (which embraces all the land in said parish owned by said lessor) are also leased all the buildings, outhouses, fences, and other appurtenances thereof, consisting of," etc.

Then follows a minute description of the sugar house and machinery, and all the buildings and surroundings, etc., not one nor any of which are shown to have been impaired or lost. In fact, none of the property so described as leased has been wholly or partially destroyed by a foreseen or unforeseen event, and there can be no question that if the contract between the parties had gone no further as to the property — to go into the possession of the lessee, no argument even could be had about the matter.

But it is contended that as the property leased is generally described in the lease as "a sugar plantation," and as the con-
183 tract between the parties contains this provision—to wit, "And the said lessor further declared that he does hereby give unto said lessee all of the growing cane crop of 1883 now standing in the field, which said lessee expressly binds himself to plant as seed cane on said plantation; and to reimburse said lessor for said cane crop, said lessee binds himself to leave on said plantation, for the sole use and benefit of said lessor, at the termination of this lease, Dec. 15, 1888, eighty-five acres of full standed seed cane (such as is usally called first year's stubble), which has been thoroughly cultivated, cut at the proper time for saving seed, and carefully windrowed, especially for seed; and in addition thereto said lessee shall also leave on said plantation, for said lessor, not less than 200 *hundred* acres of stubble, from what is called plant cane, which shall be properly protected in the ground"—and as the seed cane so given was planted on said place, and was destroyed by the crevasse, together with the bridges and ditches, that the thing leased was a sugar plantation, with growing and standing cane, and the neces-

sary appliances and conditions to grow and raise each year sugar, and that the "thing" so leased has been destroyed.

The term "sugar plantation," used in the lease to denote the property leased, may or may not, by itself, mean a plantation ditched and bridged, and supplied and appareled with adequate machinery, and furnished with seed cane, and planted cane, and stubble cane, all requisite to the present growth and production of sugar, but as used in the lease it is undoubtedly limited and explained by the circumstantial description of exactly what was leased.

The very terms thereafter used with reference to the cane then in the field, and the obligations entered into with reference to it,
184 show that such cane was not leased, but was loaned for consumption, and the effect of such loan was that the cane became the property of the lessee of the plantation.

See Revised Civil Code, arts. 2910 and 2911.

In this case I think it is clear that the thing leased has not been destroyed.

2. In view of the first conclusion I deem it of little importance whether the crevasse and overflow resulting in the damage aforesaid was or was not an unforeseen event.

Under Louisiana law the lease is dissolved by the loss of the thing leased. See art. 2728, R. C. C.

It is true that in art. 2697 of the Code it is provided that the lease shall end if the thing be destroyed by an unforeseen event, but it seems to me that article 2728, *supra*, is all embracing, and as it is without condition, and as by other articles of the Code the existence of the thing leased is essential to the life of the lease (see arts. 2692 and 2710, R. C. C.), it matters little to the continuance of the lease how the thing leased is destroyed, if destroyed or lost at all.

However this may be it is the settled jurisprudence of the State of Louisiana that crevasses and overflows of the Mississippi river are not unforeseen accidents.

Vinson *vs.* Graves, 16th La. Ann., 162; Mason *vs.* Murray, 21st La. Ann., 535; Jackson *vs.* Michel *et al.*, 33d La. Ann., 723; and this is in accordance with the natural state of things as they exist in the alluvial portion of Louisiana, where the plantation in question is located.

3. The third conclusion of the master is not exactly clear. He hardly means that a sugar plantation without canals and
185 ditches, and bridges over the canals and ditches, is more suitable for cultivation than one with those ordinarily considered useful improvements.

But taking his conclusions to mean that the alluvial deposit left on the place by the overflow has improved (probably) the fertility of the land, and that cleaning out ditches and canals and the repairing of bridges are usual and incidental to the cultivation of a sugar plantation, the conclusion is in accord with the evidence in the case.

4. As to equitable relief the complainant repudiates any demand for a reduction of rent, and claims a dissolution of the contract of lease on two grounds: 1. "The destruction of the leased premises in the whole or at least in part; 2. The failure of the lessor to comply

with the warranty in the lease to maintain the thing in a condition such as to serve for the use for which it is hired, inasmuch as the use of it has been much impeded; indeed, so much so that it may well be said that the use of it has entirely failed."

No relief is claimed under the general rules and principles of equity as administered ordinarily in a court of chancery.

Indeed, it may be doubted if any could be given. See Story's Eq. Jur., sections 101 and 102; Pomeroy, Eq., section 823.

The complainant is then, of course, remitted to the Louisiana Code for authority to grant such relief as he asks.

From the facts found by the master the thing leased has not been destroyed in whole or in part, the crops on the place forming no part of the thing leased, and if they do and were destroyed by an unforeseen event for such destruction the Code only gives an abatement of rent (Code, art. 2743), which, as has been said, is repudiated by the complainant.

186 The Code, article 2692, expressly stipulates that the lessor is bound to maintain the thing in a condition such as to serve for the use for which it is hired; but, except as provided in article 2669, failure to keep in repair or condition does not annul the lease, for in such case the lessee is required to make the repairs himself and deduct from the rent, article 2694; and in this case it may be noted that complainant in his supplemental bill admits that by his contract he was to keep the place in repair.

Article 2699, *supra*, is as follows: "If, without any fault of the lessor, the thing ceases to be fit for the purposes for which it was leased, or if the use be much impeded, as if a neighbor by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity."

The thing leased in this case was for the purpose of serving as a sugar plantation, a place on which cane was to be grown, thereafter to be made into sugar, and it is vigorously contended that it has "ceased to be fit for that purpose," and that "its use has been much impeded." The argument is that as the ditches and canals are filled up and all the seed cane destroyed, requiring great labor and expense and much delay to put the place in the condition it was before the overflow and so as to make sugar cultivation thereon profitable, the thing has ceased to be fit, and the lessee is much impeded within the terms and meaning of article 2699, *supra*.

The facts in the case do not warrant the finding that the place has ceased to be fit for a sugar plantation. It is incontestable that it can be used for the purpose of growing cane and making sugar; labor and expense are all that is required, and I take it they

187 are always required, and this place can differ from others in that respect only in requiring more of each.

Nor can it be said that the lessee by the overflow is much impeded in the use of the place.

If the water had remained and now covered any considerable portion of the place, there would be much impediment in the use of the thing, but as the facts appear the lessee has the full, unob-

structed use of the thing leased. The case is that complainant has lost crops and the present prospect of making profitable crops, and under his contract, according to equitable and Louisiana jurisprudence, he must bear his loss, as he does not bring his case within the provisions of article 2743, R. C. C., for an abatement of the rent.

There is no adjudicated Louisiana case cited that supports the complainant's demand for annulment of the lease on the ground that the defendant has failed to comply with the obligations of the contract.

The Louisiana cases cited by the master are adverse. See Dussman *vs.* Geneas, 6 A., 279; Denman *vs.* Lapiz, 12 A., 823. A few words as to the French authorities cited:

The extracts from Troplong (Troplong du Louage Des Choses, Ch. 695 and 697) on the effects resulting from the loss of the fruits and the harvest from fatal circumstances and through violent perturbations, and claiming that the fruits not gathered are at the risk of the lessor, are taken from his commentaries on articles 1769 and 1770 of the Code Napoleon, relating solely to the reduction of the rent in case of the loss of the harvest.

The extract from Marcadi, vol. 6, p. 499, is an isolated extract from his commentaries on art. 1771, Code Napoleon in relation to
188 the loss of fruits separated from the soil. The extract from the same author, vol. 6, art. N. C. 1720, is from a commentary on art. 1720 of the Code Napoleon, the place for which is supplied in the Louisiana Code by arts. 2693 and 2694, in relation to the repairs to be made by the lessor.

A comparison of the two codes will show that the Louisiana Code goes further than the Code Napoleon in this: That it provides that in case of the refusal of the lessor to make the repairs the lessee may cause them to be made at the lessor's expense.

The case of De Silly C. DePommereau, Journal de Palais, 1872, p. 939, which counsel present "as having the advantage of presenting precisely the features of the present cause," has been misapprehended, as in that case the court of cassation refused to rescind and annul the lease, but held that the rent might be reduced, and so ordered.

No adjudicated French case is cited which justifies the court in concluding that the French jurisprudence in cases similar to the present differs from our own.

The complainant's case is a hard one, and if the justification could be found either in Louisiana law or in the general principles of equity I should be very glad to afford him relief, even to compelling the defendant, who is in no wise in fault, to share part of the inevitable loss; but, as I understand the case, under the authorities, the complainant can have no reduction of rent because the overflow was not an accident of such an extraordinary nature that it could not have been foreseen by either of the parties at the time the lease was made (R. C. C., art. 2743), nor can he have a dissolution or annulment of the lease, because the thing leased has not been de-
stroyed in whole or in part by an unforeseen event (R. C. C.,
189 art. 2697), nor lost (R. C. C., art. 2728), nor has it ceased to

be fit for the purposes for which it was leased (R. C. C., art. 2699), nor is the use of it much impeded. (R. C. C., art. 2699.)

The exceptions to the master's report will be overruled with costs, and the report will be confirmed and *and* homologated, and the defendant will be allowed to take a decree dismissing the complainant's bill with costs.

CLERK'S OFFICE.

A true copy of the original.
New Orleans, Aug. 14, '84.

H. J. CARTER,
Deputy Clerk.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

190 Supreme Court.

RICHARD VITERBO
vs.
S. FRIEDLANDER. } No. ——.

Into Court comes Richard Viterbo, pl'ff and appellant, who avers that the judgment of the lower court dismissing his bill is erroneous, on the grounds—

1st. That when property leased has been rendered unfit for the purpose for which it was leased by the act of God, the lease is dis-olved.

2d. That the facts show that the plantation leased as a sugar plantation has been destroyed, and the lease is at an end.

3d. That sugar cane, which is in the form of plant & rat-
191 toon or stubbles, is a part and portion of the land, and when destroyed the same annuls the lease.

4th. That the draining ditches and canals dug by the lessee in fulfilment of his obligation under his lease become the property of the lessor, and when destroyed by a crevasse it becomes the duty of the lessor to put them back in the condition they were before the crevasse.

5th. Then, when a lessor is duly put in default to "fulfil a part of his obligations as landlord and refuses, the lease is dissolved.

Wherefore plaintiff and appellant prays that the judgment appealed from be reversed, and that judgment be rendered in his favor in accordance with the prayer of his petition & bill, & he prays for general relief, &c.

CH'S LOUQUE,
ALBERT VOORHIES,
Of Counsel.

Endorsed on cover: E. Louisiana, C. C. U. S. No. 1089. Richard Viterbo, appellant, *vs.* Samuel Friedlander. Filed October 13, 1885.

DEC. 28 1893
JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States.

No. 1089.

RICHARD VITERBO

versus

SAMUEL FRIEDLANDER.

Brief on behalf of Plaintiff, Appellant.

CHAS. LOUCKS,
ALBERT VOORHEES,
of Counsel.

A. D. HOSKINS, Brief Printer, 233 Chestnut St.

Supreme Court of the United States.

No. 1089.

RICHARD VITERBO

versus

SAMUEL FRIEDLANDER.

Brief on behalf of Plaintiff, Appellant.

This case comes up by appeal from the Circuit Court for the Eastern District of Louisiana. The purpose of this suit is to revoke the contract of lease of the Friedlander sugar plantation, to obtain the return of the rent notes and indemnity.

On 27th October, 1883, Samuel Friedlander leased to Richard Viterbo, a certain *sugar plantation*, situate in the Parish of St. Charles, State of Louisiana, including "all the growing cane standing in the field which said lessee expressly bound himself to plant as seed cane on said plantation," and paraphenalia of the sugar plantation, etc.

The consideration of this lease was the payment of the sum of $25,000, in 5 promissory notes, each of $5000, payable on the 1st December, 1883, 1884, 1885, 1886 and 1887, with 8% per annum interest from maturity, and the return of 85 acres of plant cane and of 200 acres of stubble cane.

As a part of the leased premises the lessor turned over to the lessee the whole standing crop of cane of 1883, stubble and plant; "*which the latter expressly binds himself to plant as seed cane on said plantation.*" And, in return therefor, "said lessee binds himself to leave on said plantation, for the sole use and benefit of said lessor, at the termination of this lease, December 15th, 1888, eighty-five acres of full stand seed cane, (such as is usually called first year's stubble), which has been *thoroughly cultivated*,

cut at the proper time for saving seed, and carefully wind-rowed especially for seed;—and, in addition thereto, said lessee shall also leave on said plantation, for said lessor, *not less than* 200 *acres of stubble, from what is called plant cane, which shall be properly protected in the ground.*"

Further on: "And said lessee binds himself to deliver said plantation, at the expiration of this lease, *with the ditches in a good draining condition, sufficiently so for the proper cultivation by said lessee during his fourth year's occupancy of said plantation;* and the foregoing clause means that said lessee shall not neglect, nor allow the filling up of said ditches during the last year of this lease any more than ditches usually fill up in one year on *a well managed sugar plantation in good condition.*"

Further on: "And said lessor further declared that he leaves with said lessee, *to be used in the culture of sugar cane on said plantation*, 34 mules".....also "the following articles for use on said plantation, to-wit: *cane carts*, other carts, harrows, flukes, *stubble diggers*,.....hooks for spreading bagasse," etc., etc., as more fully detailed in the notarial act of lease. R. p. 9.

In Louisiana sugar cane is propagated by the planting of the stock, and at each joint, the eye sprouts, making another cane, which in its first year's growth, is called plant cane. When this crop is ripe, the cane is cut close to the ground and without further planting, the roots left in the ground, sprout and make another crop which is called, first year stubbles, or rattoons; this crop is again cut close to the ground and the roots furnish another crop which is called, second year stubbles, or rattoons, and so to the third year, after which time, the roots are dug up and the land is renewed with corn and pea vines, and allowed to rest for one and two years, and is then replanted with cane.

The first instalment of $5000 was paid at maturity.

The lessee, in strict compliance with the contract, planted the whole of the standing crop. He cleaned or deepened the existing canals and ditches, dug new canals, and put the whole sugar plantation in a high state of cultivation, with 175 acres of plant cane and 120 acres of stubbles.

In the month of March of (1884,) occurred the Davis crevasse on the Mississippi river, in the vicinity of the Friedlander plantation and as an unavoidable consequence resulting from a fortuitous event, this plantation was submerged and remained several months under water. When the overflow subsided it was

ascertained that the plantation was a wreck, the whole of the cane was ruined, the bridges swept away, and the drainage destroyed, in fact the sugar plantation presented the appearance of waste lands.

In June, 1884, Plaintiff put Defendant in default by notifying him 1°, to reinstate the plantation in its previous condition as soon as the subsidence of the waters would allow, and 2°, to replace the plant cane and stubbles. R. 13.

In answer to this demand, Mr. Friedlander said: that "he denies and repudiates *in toto* the obligation imputed to him of replacing either plant or stubble cane." R. 14.

As regards the replacing of the drainage he made a diplomatic evasion, which can only be construed into a denial of Plaintiff's demand. R 14.

The grounds for a dissolution of the lease are 1°. That the crevasse "entirely destroyed the sugar cane, filled the draining ditches, and did other damage to said plantation, so that it ceased to be fit for the purpose for which it was leased."

This ground is based on Article 2699, of the Civil Code: "If without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbor, by raising his walls, shall intercept the light of a house leased, the lessee may according to circumstances obtain the annulment of the lease, but has no claim for indemnity."

If the mere raising of a wall, and shutting out of light would warrant the dissolution of a lease, "according to circumstances," how much stronger is the case of a lessee, whose property leased has been covered with water to the depth of several feet, during several months, destroying the seed cane and stubble leased, carrying away the bridges and filling up the drainage canals. There is no case where a Plaintiff has greater foundation for relief than the one shown by this Record.

2°. The second ground for a dissolution is, that the "said property was destroyed, without the fault of the lessee."

This ground is supported by Article 2728, of the Civil Code which reads as follows:

2727: "The lease ceases of course, at the expiration of the time agreed on;

2728: "It is also dissolved by the loss of the thing leased."

If the lease was one of a "*sugar plantation*" then the thing leased has certainly been destroyed. If the lease consisted mere-

ly of lands and buildings, then the lands and buildings are yet in existence.

The lower court on commenting on the meaning of the term "*sugar plantation*" as contained in the lease, said: "It may, or may not, by itself, mean a plantation ditched, bridged, supplied and apparelled with adequate machinery and furnished with seed cane, and planted cane, and stubble cane, all requisite to the present growth and production of sugar."

The lease recites that it is one of a "sugar plantation" with a growing crop of cane which the lessee binds himself to plant. The term, sugar plantation, has a well defined meaning in Louisiana, where the chief produce is sugar.

Witnesses for Plaintiff and Defendant may have differed in other respects, but they all agree in defining what is a sugar plantation. They were satisfied that before the Davis crevasse the Friedlander plantation was a sugar plantation, but that it has since ceased to be one.

A plantation means "land brought under cultivation;" (Webster's Dict.) and a sugar plantation means "land brought under cultivation to make sugar." The cultivation necessitates the raising and gathering of the cane,—the drainage of the land.

In Louisiana, a sugar plantation means cane, stubble and plant, drainage, bridging, a sugar house, and all the paraphernalia necessary for tilling the soil, raising the cane crop, gathering it, and converting it into sugar.

The Friedlander estate was a sugar plantation at the date of the lease; it has since ceased to be one. It is now but a body of vacant or waste land.

The Circuit Court, however, holds that the term *sugar plantation as used in the lease* is undoubtedly limited and explained by the circumstantial description of exactly what was leased. The very terms thereafter used with reference to the cane, then in the field, and the obligation entered into with reference to it, show that *such cane was not leased, but was loaned for consumption;* and the effect of such loan was that *the cane became the property of the lessee of the plantation.*"

Hence the court concluded that no "sugar plantation" had been leased by Friedlander to Viterbo; but that the thing leased was: lands, buildings, sugar house, cane carts, etc., without reference to the fact that these constituted a sugar plantation, and were so denominated on the contract itself which recites the

lease of "A certain *sugar plantation* . . . known as Friedlander's plantation . . . . . *and with said plantation* ..... all the buildings, out houses," etc., etc. .....

This enumeration of items could not be considered as an exclusion of all others. It is merely enunciative of the component parts of a sugar plantation.

If these enumerated parts exclude all others, still they, of themselves, fully answer the appellation of "a sugar plantation, known as the Friedlander plantation."

The enumeration might be construed to exclude other parts not enumerated; but certainly it would not change the character or nature of that which is enumerated, and which absolutely constitute a sugar plantation.

The context of the contract fortifies this common sense view of the "thing leased." It contemplates that during the five years' lease the lessee shall cultivate the plantation as a sugar estate; and for the first year (1884) that he shall plant the whole crop of standing cane of 1883, as plant cane. The 34 mules are leased as part of the plantation, with the express stipulation that they are "*to be used in the culture of sugar cane on said plantation.*" During the fourth and fifth years, (1887 and 1888), the plantation must be thoroughly cultivated as a sugar plantation, so as to leave to the lessor, at the end of the lease, "85 *acres of full stand seed cane,*" and "*not less than* 200 *acres of stubble, from what is called plant cane, which shall properly be protected in the ground.*" The lease provides for the condition of the drainage of the sugar plantation at its termination.

It is said, however, that the standing cane of 1883, "was not *leased,* but that it was *loaned* for consumption, and the effect of such loan was that the cane became the property of the lessee."

Under this hypothesis, the lessee would have had the right to use and dispose of that cane as his property,—gather and transform it into sugar,—sell or donate it to whom he pleased. Such conduct, however, would have been violative of the contract of lease, because the lessee "*expressly bound himself to plant as seed cane on said plantation,*" the standing cane crop of 1883.

The lease itself does not use the expression, loan: the "LESSOR does hereby *give* unto said LESSEE all the growing cane crop of 1883, now standing in the field, *which the said* LESSEE *expressly binds himself to plant as seed cane on said plantation.*"

The lessor was taking stringent measures to insure the proper cultivation of his sugar plantation, as a sugar plantation.

The word Lessor preceding and the term Lessee following the word "give" preclude the idea of any other contract than a lease. The crop of 1883 was, all of it, to be used as seed cane for the next year; and at the end of the five years, a corresponding quantity of plant and stubble canes was to be left on the plantation, to be delivered to the lessor. The parties then had in view La. C. C., Art. 2671 (2641): "The price (of lease) should be certain and determinate, and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased." Friedlander leased his sugar plantation with the standing cane crop of 1883, for the sum of $25,000 payable in yearly installments of $5000, and the return of the 85 acres of plant cane and 200 acres of stubble cane at the termination of the lease.

Under the Louisiana jurisprudence the crop in the ground, up to the time of their severance from the soil, forms part of the "thing leased"—and this is true not only of such crops as were in the ground at the date of the lease, but of all successive crops.

To make it clear beyond doubt, that the thing leased, was a sugar plantation, a thing in actual production of sugar, not merely lands and buildings, let us change the terms and substitute an orange grove, in full bearing, which takes not less than eight years to raise bearing orange trees, or a coffee plantation, which takes three years for the coffee plant to bear, can it be successfully contended that what was leased, consisted of lands on which orange or coffee trees might be raised? The idea is preposterous. What was leased in this case was a sugar plantation in full production, yielding a revenue. Stubbles which might be cut during three years, without replanting. The cane and stubbles were the thing leased, in reality, and the land was only used as a necessary thing to produce the crop. So in the case of the lease of an orange grove, the lease would not be one of land merely but of orange trees and their destruction, like the destruction of the cane, would carry with it a dissolution of the lease. It is difficult to conceive of another correct interpretation of this lease.

3°. The third ground for the dissolution is the refusal of the lessor, after being put in default "to maintain the thing in a condition such as to serve for the use for which it is hired."

This ground is based on the two following articles of the Civil Code 2692: "The lessor is bound from the very nature of the contract, and without any clause to that effect, 1°. To deliver the thing leased to the Lessee;

2°. To maintain the thing in a condition such as to serve for the use for which it is hired;

3°. To cause the Lessee to be in a peaceable possession of the thing, during the continuance of the lease."

2729: "The neglect of the Lessor or Lessee to fulfill his engagements, may give cause for a dissolution of the lease, in the manner expressed, concerning contracts in general, except that the Judge can not order any delay of the dissolution."

1911: "The debtor may be put it default in three ways, by the term of the contract, by the act of the creditor, or by operation of law." * *

2. By the act of the party when, at, or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in presence of two witnesses.

Mr. Friedlander was duly notified in writing to place the property leased in the same condition it was when leased, and he refused; the lessee was from that moment released from the obligations of his lease.

La. C. C. 2721 (2691). "The lessee is only liable for the injuries and losses sustained through his own fault."

When, and to what extent is the lessor responsible, under his warranty, for the destruction of crop? And does the total or partial destruction of the crops constitute a partial loss of the thing leased?

La. C. C. Art. 465 (456), classifies "standing crops," not only as immovable, but adds: "*They are considered as part of the land to which they are attached.*"

Says Troplong, (Contract of Lease No. 695): "Indeed, the fruits not gathered, the hanging fruits, constitute *a part of the soil;* as long as they have not been harvested by the lessee, the right of accession gives them the same status, as that of the soil itself. *They are therefore, like the soil, at the risk of the lessor.* Such is the opinion of the Roman jurisconsults." And he further observes: "Therefore, before the harvest *they are part of the*

soil. Therefore, if they are destroyed by fortuitous event, it is precisely as if part of the very soil had been destroyed. Such is the irresistible reason, which is at the base of the theory of the civil law."

The growing crop is an integral part of the predial estate: It is so peculiarly in the contract of lease, *where future crops, succeeding each other yearly,* come under the operation of this rule, and remain so, as long as not harvested or gathered,—or to use the quaint legal expression: as long as they hang by the roots.

Says Marcadé, (Vol. VI, Com. on Art. C. N. 1771, p. 499): "The *expected crops* are to be here considered as *integral part of the thing leased.* Each crop before its perception, as its severance from the soil does constitute (*contractually* as well as *physically* considered), but one and the same entity with the estate; and it is for this reason that the lessor ought to, and has always been at all times, in the ancient Roman law, as to-day, bound *in warranty* for crop due but not realized."

The distinction between the growing crop and gathered fruit, is strikingly drawn in La. C. C. Arts. 2743 (2714) and 2744 (2715), Treating of Lease. And in La. C. C. Art. 465 (456): "Standing crops and the fruits of trees not gathered, and trees before they are cut down, are likewise immovable, and are considered as *part of the land to which they are attached.*"

Troplong, (Lease No. 697): "But if fatal circumstances, if violent perturbations unexpectedly carry away, and with notable damage, the fruits which were growing, the harvests which covered the soil; *then the basis of the contract is upset;* the chances overshoot the provisions of the parties; *it can no more be said that the lessee has enjoyed the thing leased, since* a real and considerable *part of it has been suppressed.* Equity which closed its mouth when the loss was trivial, finds no application here. The law resumes its sway, and the principle must be enforced '*que le bailleur doit faire jouir le preneur paisiblement*' — that the lessor must make the lessee enjoy peacefully."

This is directly in point. Troplong adds, that the reason is: '*les fruits sont une partie de la chose, et que leur perte equivant à la perte d'une partie de la chose,*'— that the fruits are part of the thing, and that their loss amounts to the loss of a part of the thing."

See the following decisions of the Court of Cassation (France):

Journal du Palais, 1872, p. 939, De Silly vs. Pommereu; —ibid— 1879, p. 909, Sirven vs. Darolles.

See also Dalloz, verbo Louage, Sec. I, Art. IV; case of Pelleri, which is in point.

In de Silly vs. Pommereu the Court said, in speaking of the injury done to *one-half of the standing crop*, (p. 941): "From which it follows that there is not *total loss* of the thing leased, but simply *a partial alteration of its substance.*" And further, at p. 942: "Considering that the *momentary alteration of the substance of one-half of the grass crop*, of which de Silly is lessee, constitutes a *partial loss of the thing leased*, in the sense of last part of Article 1722, above quotes" ..... (which article of the French Code is our Art. 2697 (2667).

The Court of Cassation in that decision, rendered in 1879 on text of the French law, which is reproduced in the La. Civil Code, maintains the doctrine of the partial destruction of the leased thing as resulting from the partial destruction of the crop in the ground.

But in the case at bar *not only* was the whole standing crop destroyed, but the net-work of canals, and ditches, and the bridges were swept away; and the whole land, covered with sand, was turned into a desert. If the mere destruction of one-half of the standing crop alters the substance of the leased thing, and constitutes the partial destruction of the *leased thing* here, unquestionably the destruction of the whole crop as an incident of the ruinous transformation of the cultivated cane fields into mere waste lands must be considered, if not, *the total destruction of the leased premises as a sugar plantation*, at all events a *partial destruction* of the leased premises.

His Honor the Circuit Judge, concedes the similarity of provisions in the Louisiana and French Civil Codes, upon the subject matter under discussion: but adds: "that the Louisiana Code *goes further* than the Napoleon Code *in this*, that it provides that, in case of the refusal of the lessor to make the *repairs*, the lessee may cause them to be made at the lessor's expense."

In other words that, as to other matters than dissolution of lease by reason of total or partial destruction, there are special additional provisions of law in our Code as to more repairs granted. But what have repairs to do in the present litigation? Repair the Friedlander sugar plantation by making a whole network of new canals and ditches in place of those destroyed? by

making new bridges? by planting and growing 85 acres of plant cane and 200 acres of stubble cane? Repairs, there!

It takes one and two years to turn one year's plant cane into stubble. So that it would take the second, third and fourth year of this five year lease, to realize these so-called repairs! And it would take, as proven by the witnesses, much time and a heavy investment of capital.

The argument made that, with energy, perseverance and a lavish supply of funds, the ditches and canals on the Friedlander estate can be renovated,—the crops replanted,—the bridges rebuilt,—and the waste lands again converted into fertile sugar cane fields, present a bald sophism of anachronistic appearance.

Besides, this would amount to reconstruction, and could, by no possibility, be considered in the light of repairs.

The La. Civil Code distinguishes even between "reparations locatives" light repairs, which do not impede the use of the leased thing, as contemplated by the contract, and such repairs, which relate to what is a serious impedent to the use of the thing leased. La. C. C. Arts. 2699 (2669), 2700 (2670), 2715 (2685), 2716 (2686), 2717 (2687). In the first category the use of the premises is not *much impeded* (as specially provided in Art. 2699 (2669), which, in such cases, gives right to revocation of the lease),—and the lessee has the privilege of making these repairs himself, if lessor fails, or refuses to make them. The policy of the law is averse to the unnecessary disturbance of leases of real estate; and introduces, therefore, this exception to the right of asking revocation.

But, in the other category, as the disturbance is serious, "*the use of the lessee being much impeded*" by disaster, the general rule prevails: the lessee is to judge for himself whether he will put up with the impediment, or seek relief in the dissolution. La. C. C. 2046 (2041), 2599 (2659).

The case of Welham vs. Lingham, 28 A. 903, illustrated the distinction. The dispute was for trifling repairs, "reparations locatives," which constituted no impediment to the use of the property. The Court, in that opinion, refers to Hennen vs. Hagdan, 5 An. 713, and to Perret vs. Dupré, 3 R. 54, which are in accord with the above expressed views. Also to Scudder vs. Paulding, 4 R. R. 430, where the repairs came strictly under Arts. 2694 (2664), 2716, (2686). These were repairs, which the lessee could only make, and pay out of the rent. They were not in the

nature of restoration or reconstruction. The lessee had at hand an easy remedy, of which he had not availed himself.

In the case at bar Viterbo was not allowed to prove the enormous outlay, which it would require to restore the indispensable drainage and to replace the plant and stubble cane destroyed, but enough has been admitted to show that it would take as much as several years' rent, possibly more than the whole rent. And besides the imminent loss of the second and third years' crop, this lessee has actually been deprived during the whole year 1884, of the contractual use of the sugar plantation, as in the language of La. C. C. Art. 2587 (2657), a whole year is "the time necessary in this State to enable the farmer to make his crop, and to gather in all the produce of the estate, which he has rented."

Therefore, Viterbo had a right to call upon Friedlander to comply with the warranty as lessor, "to maintain the thing in a condition such as to enable his lessee to enjoy it as a sugar plantation. The failure to comply accompanied by a putting in default, determines the right of resorting to this action of revocation. A resolutory condition is implied in all commutative contracts, which gives the lessee this right of action. La. C. C. Art. 2045 (2040), 2046 (2041).

This lease is avoided also by the total loss or destruction of the leased premises as a sugar plantation, and by its partial loss or destruction, and also by such serious impediment to the use of the thing leased:

Either of these three grounds suffices to maintain the action of revocation or dissolution.

A lease is "dissolved by the loss of the thing leased." La. C. C. 2728 (2699). By a preceding Article—2697 (2667.—the lease is at an end by the total destruction of the thing, and when there is only a partial destruction the lessee may either demand a revocation of the lease, or a diminution of rent. In neither case can he demand indemnity. By Art. 2721 (2691), "*the lessee is liable only for injuries and loss sustained through his fault.*" And by Art. 2743 (2714), when the whole, or a part of the crop has been destroyed by accident, the general rule is, that there is no right to an abatement of rent; but, such abatement is due when the accident is of such extraordinary nature, that it could not have been foreseen by either party at the date of the contract.

These are textual provisions. They refer to several categories

of cases. The main distinction is between the action of revocation of lease, and the suit for abatement of rent, which are in diametrical, opposition, since one contemplates the continuance of the lease, the other its dissolution. The tenant must elect between the one or the other. If he prefers the continuance of the lease, then occur the questions of diminution of rent, and claim for indemnity, which must not be confounded. The text is precise: "the lessee may demand either a diminution of the price, or a revocation of the lease. In neither case, however, has he any claim for damages." C. C. 2697 (2667).

In case of partial destruction of the thing by fortuitous event, when the tenant elects to continue the lease in operation, he is limited to ask an abatement or diminution of the rent; but, whatever the damages sustained by him, he cannot sue for indemnity.

When, in such case, he elects the annulment of the lease, he is entitled as a corollary, to have the restitution of the price, and forfeits all rights to damages.

The forfeiture of damages, however, does not obtain if the thing be totally destroyed. So that, in addition to the restitution of the price, the lessee may be entitled to indemnity for damages.

Under the Code, whenever the tenant elects the continuance of the lease, he forfeits all claim for damages. Aliter, when he asks the revocation.

The rules laid down in C. C. Art. 2743 (2714), govern only diminution or abatement of rent, but they find no application in revocation of lease. The text is special and exceptional in that respect. How is it possible to imagine an abatement of rent when the lease is revoked? The very ideas are contradictory! This Article speaks only of the destruction of the crop by a fortuitous event, with reference to diminution or abatement of rent; while other Articles provide for the mutual rights and obligations of landlord and lessee, with a view to the revocation of the contract. C. C. 1933 (1927), Nos. 2, 3; 2721 (2691), 2697 (2667), 2699 (2669), 2692 (2662), 2710 (2680), 2711 (2681).

The *loss* of the thing leased, puts an end to the lease; its total destruction dissolves the lease *ipso facto;* whilst its partial destruction only gives to the lessee the option of revocation.

The law does not use the terms *obsolute* loss or destruction, which would imply annihilation. Destruction may be absolute in

one sense, and it may be relative. A musical instrument may be broken to pieces, so as not even retain its original form. In one sense of the word, that destruction or loss would be absolute. On the other hand, the instrument, although retaining its form, may be injured and affected so that it could not be reinstated to its original useful condition of a musical instrument. That would be a relative loss or destruction of the *musical* instrument, which might yet have intrinsic value as *material;* but not as a *musical* instrument, since its present condition does not allow of its use as a *musical* instrument.

In the pending case, what was the thing leased? Was it simply land, buildings, mules, implements of husbandry? By no means. It was a sugar plantation.

Considered as a sugar plantation, which by fortuitous event it has since ceased to be, it may well be said that the thing leased is a total loss. The sugar plantation, as such, is destroyed.

There was not a total loss or destruction of each and every part of the leased thing, since buildings, mules and implements were saved, and the land, although left in a fearful condition, agriculturally speaking, is still in sight. Nevertheless, there is relatively a total loss. Indeed, can there ever be absolute loss or destruction?

But beyond all caviling, there is a partial loss and destruction of the thing leased,—a material one, sufficient to upset this lease.

But, Defendant's counsel answer, that conceding the total or partial destruction of the thing leased, Plaintiff would not be entitled to relief, because inundations by a crevasse of the Mississippi river are not "unforseen events," and that C. C. Art. 2697 (2667) dissolves the lease, only when "the thing be totally destroyed by an unforeseen event," and that the rule applies in partial destruction.

The whole argument, however, turns upon the words "unforeseen events;" and, therefore, the absolute destruction of the thing *in toto* by an event not unforeseen, would not put an end to the lease, and the lessee must continue year after year to pay rent, precisely as if he was using the thing which exists no more. A glaring absurdity! The mistake consists in not observing that the term "unforeseen event" is a loose translation of "cas fortuit" in the French text, which must prevail as firmly established by our jurisprudence.

The term "unforeseen event," stands really for "*fortuitous event*," which, as defined by C. C. 3556 (3522), "*is that which happens by a cause which we cannot resist.*"

C. C. 2697 (2667), therefore treats of all destructions of the thing leased, whether in whole or in part, by a cause which we cannot resist, a fortuitous event, *vis major*. So considered, it harmonizes with all the other provisions of the Code on the subject matter. Considered otherwise, it is at war with them, and besides leads to a rank absurdity.

C. C. 2728 (2699), says that the "lease is also dissolved by the loss of the thing leased." Art. 2721 (2691): "The lessee is only liable for the injuries and losses sustained through his own fault." And the respective rights and obligations of lessor and lessee, as fixed by C. C., Arts. 2692 (2662), 2710 (2680), and, as held by the commentators and jurisprudence, are wholly inconsistent with the theory that the loss *of the thing* by a fortuitous event can, in any contingency, be chargeable to the lessee, and *may not put an end to the lease.*

The reference to the cases of Vinson vs. Graves, 16 An. 162, and of Jackson vs. Michel, 33 An. 723, is not felicitous, since they treat only of abatement of rent and not of dissolution of leases.

Had Viterbo sued for an abatement or diminution of rent, the C. C., Art. 2743 (2714), which treats especially of "*an abatement of the rent*," would have determined the controversy. The gist of the discussion then would have been, whether the accident was a fortuitous event, which was in the contemplation of the parties at the date of the contract, or which was of "such an extraordinary nature, that it could not have been foreseen by either of the parties, at the time the contract was made."

But this is a rule which obtains only when the lessee elects to continue the lease, and asks for a diminution or abatement of rent. The provisions of C. C., Art. 2743 (2714), are special and exclusive in that sense. They find no application whatever in actions for the dissolution of leases.

But the quoted cases do not hold that inundation by a crevasse in the banks of the Mississippi river is not a fortuitous event, *vis major*. The Court lays down the doctrine carefully in Vinson vs. Graves: "The periodical overflow of the waters of a river, is not an extraordinary accident: and, if a party seeks to give to an inundation that character, he must show that it was

unusual, unforeseen, *and one to which the country was not ordinarily subjected.* See Troplong, du Louage, Nos. 207, 211. *The frequency of overflows and crevasses in the levees on Mississippi river is not disputed in this case, but is, on the other hand, sufficiently established by the evidence.*" The opinion in Jackson vs. Mitchel, simply affirms the above decision.

So that, even were the present suit one in diminution or abatement of rent, Viterbo could successfully answer that he does dispute the frequency of overflows and crevasses on the Mississippi river, in the Parish of St. Charles, where the Friedlander plantation is situated; that a crevasse and overflow in that whole parish is unusual and unforeseen, and that, as abundantly proven, this parish is not ordinarily subject to such accidents; that, before the Davis crevasse, twenty-five years had elapsed without a solitary accident of this kind; that the only evidence of a previous accident of this kind, was a partial inundation in 1853, on one side of the river, from the Labranche and Bell crevasses; but there is no evidence that, in any previous year, there ever was an inundation by crevasse in St. Charles Parish, on either side of the river.

This would be conclusive on the facts, as was conclusive the answer on the law; but this discussion, under C. C. Art. 2743 (2714) is a digression, since the provisions of that article do not apply to dissolution of leases, as abundantly shown by the Civil Code itself, and by the jurisprudence.

But even if it be held that this Article 2697 (2667), applies *only to "unforeseen event"* and not to "*fortuitous event,*" defendant is no better off; for then Plaintiff's remedy is fully borne out *aliunde* by C. C. Art. 2728 (2699), which includes fortuitous events; and by Art. 2721 (2691), which limits the lessee's liability to injuries and losses, through his own fault; and by Art. 2699 (2669), which, in all cases were the use of the leased premises is much impeded, authorizes the lessee to obtain the annulment of the lease, *although without any fault of the lessor.*

But read Art. 2697 (2667), with the expressions of "fortuitous event," instead of "unforeseen event,"—as it should be read, and all these various provisions of the Code concord with it in a harmonious system.

Now, take the other proposition: *the partial destruction* of the leased premises, by the absolute destruction of the whole net-work of drainage, and of all the plant and stubble cane in

the ground, and by the transformation of well cultivated cane fields into waste lands.

C. C Art. 2697 (2667), grants the revocation of the lease in cases of partial destruction of the leased premises by fortuitous event.

But if Defendant's view of that Article be correct as to partial destruction, as well as to destruction in whole of the leased premised, *not by fortuitous event*, but only by *unforeseen event*, his difficulty is no more obviated in the former, than in the latter hypothesis.

Limit Art. 2697 (2667), to partial destruction of the thing by *unforeseen event*, and exclude the meaning in the French text "cas fortuit" from the operation of this particular rule, then the lessee will search his remedy in other texts, and will have no difficulty to find it.

Indeed, the second next Article comes to the rescue. Art. 2699 (2669): "*If, without any fault of the lessor, the thing cease to be fit for the purpose for which is was leased; or if the use be much impeded * * * the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.*"

This text is a corrolary of Art. 2692 (2662) that: "*The lessor is bound from the very nature of the contract, and without any clause to that effect, to cause the lessee to be in a peaceable possession of the thing during the continuance of the lease.*" It is in harmony with Art. 2695 (2665) which makes the lessor *warrant* the use of the thing by the lessee during the continuance of the lease; and with Art. 2710 (2680), which recognizes the right of the lessee, during the continuance of the lease, "*to enjoy the thing leased as a good administrator, according to the use for which if was intended by the lease*" And as under Art. 2721 (2691), "*the lessee is only liable for the injuries and losses sustained through his fault,*" he cannot be made responsible for partial loss of the thing leased through the act of God, or fortuitous event.

Therefore, independently of Art. 2697 (2667), the lessee can obtain the revocation of the lease on account of partial destruction of the thing; and a *fortiori* can he do so with the proper interpretation of that Article, which legally contemplates fortuitous events generally, and should not be limited to cases merely of unforeseen events,—since unforeseen events may be neither acts of God, nor even fortuitous events.

Plaintiff is therefore entitled to the dissolution of the lease:

1°. Because the thing leased, the sugar plantation "ceased to be fit for the purpose for which it was leased;"

2°. Because the "sugar plantation," sugar cane and stubbles leased, "were destroyed;"

3°. Because the lessor refused "to maintain the thing leased in a condition such as to serve for the use for which it was hired;"

This case was first commenced by a petition which as your Honors will perceive in a few words presented the whole of Plaintiff's case. An exception of no cause of action was filed by the Defendant, which after argument was overruled by the Court and the whole was afterwards changed to the Equity side of the Court. After answer and replication, an examiner was appointed, but at the request of Defendant he was turned into a master to take the evidence, he made his report to the Court and numerous objections were made thereto by reason of his having excluded evidence and made erroneous rulings.

The evidence was however presented to the Chancellor who passed on the whole cause with the evidence before him.

Plaintiff cared not by what name the examiner was called, it is sufficient for him to have known that on passing judgment the conscience of the Chancellor had to be satisfied. The main questions argued and presented, are therefore before this Honorable Court not on any technical questions of law or practice, but upon the merits of the whole case.

Plaintiff feels that he cannot be compelled to continue as lessee of a sugar plantation which can produce no sugar in its present condition, as testified to by all the witnesses; that he cannot be called upon to pay five thousand dollars per annum for wild lands; that he has already complied with his contract of lease by making and digging large canals and ditches at a considerable outlay of money, which ditches and canals became the property of the lessor, as soon as dug; that he cannot be called upon to replace some two hundred arpents of cane, which did not belong to him when they were destroyed; in other words, that he cannot be called upon to pay to the Defendant all the damages the latter has suffered by the crevasse which was cer-

tainly a fortuitous event in the Parish of St. Charles, and in fine that he is entitled to relief.

Plaintiff, Appellant, therefore respectfully prays that the decree of the Circuit Court be reversed, that directions be issued to that Court to enter a decree as prayed for in the bill.

Respectfully submitted,

CHAS. LOUQUE,

ALBERT VOORHIES.

of Counsel.

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CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 1089.

RICHARD VITERBO, APPELLANT,

vs.

SAMUEL FRIEDLANDER.

REPLY TO DEFENDANT'S BRIEF.

This is not the case of a lessee seeking the dissolution of his lease or diminution of his rent because of the destruction of his crop. The authorities cited from the Louisiana Courts cover such cases. If the crop has not been destroyed by an unforeseen event the lessee has no claim for diminution of rent. A crevasse in the portions of Louisiana from whence these cases arose is not an unforeseen event. No case ever came from the parish of St. Charles.

The plaintiff in this case contends that the property leased to him has been destroyed, that is the plantation producing the revenue with the growing crop, the living thing leased, has been destroyed, and therefore entitles him to a dissolution of the lease.

That the condition of the sugar plantation has been altered and renders it unfit for cultivation. We do not claim that the land has been carried away, but that in its present condition it is not fit for cultivation, without being completely altered. Furthermore, we say, that it was the duty of the lessor to put back the plantation in its original condition if he desired us to continue under the lease, which he refuses to do, after having been put in default.

A house which has been burned to the ground may still be rendered inhabitable by using the same bricks and iron with which it was constructed, and making another house of the same pattern and nature.

The lessee cannot be called upon to reconstruct the house.

The stubbles, that is the roots of the cane, which produce three consecutive crops during as many years, were certainly leased; they were not loaned for consumption. The roots have not been consumed, and were not intended to be consumed. The canes were not loaned for consumption, but were leased for the purpose of multiplication. Multiplication and consumption are distinct. I cannot lease a barrel of flour to make bread, because there I consume the thing, and I cannot return it. But there is nothing to prevent me from leasing a field of cane, a grove of oranges, an orchard of apples for the purpose of enjoying the fruits, and reaping the revenues. If the orchard I lease be destroyed by the act of God, I will not be compelled to replace the fruit trees. Does not the maxim *resperit domino* apply to such a case?

It is the most inequitable, unjust and illegal view which can be taken of this case, to force one who hired a thing to replace the same when it has been destroyed without his fault.

The Judge *a quo* said: "The complainant's case is a hard one, and if the justification could be found either in Louisiana law or in the general principles of equity I should be very glad to afford him relief."

There is no need of stretching the law or the equity to perceive that a lessee who is deprived of the fruit trees which he has leased cannot be compelled to pay for their hire.

The jurisprudence of Louisiana as established in the several decisions quoted, establishes this principle: If I lease an orchard, and by reason of some foreseen event the crop is destroyed, the trees do not bear forth, I have no claim for reduction of rent or dissolution of lease. The idea is, that a farmer takes the chances of making a crop. But the Supreme Court of Louisiana or of any other civilized country has never decided that where the fruit trees themselves, that is the orchard was

destroyed, fruit, trees, root and all, that the tenant is still bound to replace the fruit trees and to put back the orchard in the same condition it was before its destruction.

In the present instance, the lease does not provide that the lessee shall be bound to buy seed cane for the lessor. It simply binds him to multiply and cultivate what was delivered to him, what was given him under the lease.

The thing delivered, being destroyed without his fault, he finds himself in the impossibility of continuing its cultivation; he is therefore released. Neither a Court of Law nor a Court of Equity can enforce the specific performance of this contract of lease, because the canes, plants and stubble Mr. Viterbo bound himself to cultivate and to return in kind at the expiration of the lease, have been destroyed by a public calamity, an overwhelming accident.

If from the force of circumstances this contract of lease could not be specifically performed, why should not the Court decree the release of the tenant from obligations which he can no longer perform? Is not the very nature and institution of a Court of Equity to provide for relief in such cases?

We respectfully submit that the jugdment of the lower Court should be reversed, and that there should be judgment for appellant, as prayed for.

CHAS. LOUQUE,

Attorney for Appellant.

Supreme Court of the United States.

No. 1093.

RICHARD VITERBO

versus

SAMUEL FRIEDLANDER.

Rejoinder to Defendant's Brief.

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Supreme Court of the United States.

No. 1089.

RICHARD VITERBO

versus

SAMUEL FRIEDLANDER.

Rejoinder to Defendant's Brief.

I. Defendant igenuously premises in his brief by stating that he will not argue the propositions, as advanced and elaborately considered in plaintiff's brief. Indeed, as he candidly remarks, he considers that "by a process of elimination he has successfully reduced the inquiry to the answer of the question, whether complainant is entitled to relief under C. C. Art. 2679." See Brief, pp. 1 and 8.

This is a happy way of avoiding the discussion of issues, raised by the pleadings, supported by evidence, and earnestly pressed by an adversary.

Our contention is:

1°. That defendant Friedlander, leased to plaintiff, Viterbo, for a term of five years, *a sugar plantation*, stocked with standing cane, plant and stubble, and having the requisite drainage, with the stipulation that it shall be thoroughly cultivated *as a sugar plantation*, and delivered over to the lessor, at the end of the lease, with the drainage of "a well managed sugar plantation in good condition," and having then "not less than 85 acres of plant cane and 200 acres of stubble."

2°. That, without any fault on part of lessee, this sugar plantation was flooded through the Davis crevasse, remained under water for several months; and that, the whole drainage was obliterated, all the bridges swept away, all the plant and stubble cane in the ground completely destroyed, and the whole field reduced to waste lands.

3°. That, *as a sugar plantation*, the Friedlander estate is destroyed,—the loss or destruction being, in that respect, *relatively total*, although the land, the buildings, the mules remain.

4°. That, at all events, there is a *real* destruction of a part of the *sugar plantation.*

5°. That, furthermore, the lessor's obligation is "to maintain the thing" (i. e. the sugar plantation) "in a condition such as to serve for the use for which it is hired,"—and that the alteration in the substance of said sugar plantation is such that it cannot, in its present condition, serve for the use for which it was hired.

II. Defendant harps constantly on the law relative to claims for diminution of rent: hence the confusion introduced in the discussion, since the Civil Code of Louisiana treats of claims for diminution of rent and cancellation of leases as distinct in their nature, and governed respectively by rules peculiar to themselves.

Defendant would fain consider the one as included in the other, as the lesser in the greater; and concludes that, because in a given case one may not be entitled to a diminution of rent, *a fortiori* would he be debarred the action of cancellation of the lease. This is sadly confusing the action to *enforce*, with the action to *set aside* the lease.

The *sole contention* in this case is, whether the facts entitle plaintiff to a *cancellation of the lease.*

THE THING LEASED.

III. *First:* Defendant, in his brief, does not distinctly controvert the proposition that the thing leased was *a sugar plantation*, and that it was leased under the express stipulation of its being cultivated *as such*, and delivered over, at the end of the lease, in a good condition as *a well cultivated sugar plantation.*

The argument in our original brief, has, in that respect, remained uncontradicted, unnoticed.

But he argues that the standing cane crop did not form an integral part of the thing leased; and that the drainage, consisting of a net work of canals and ditches of immense value, and the costly bridges necessitated by these ditches and canals, formed only an *incidental* part. Whether incidental, or otherwise, the virtual admission is that the ditches, canals and bridges, formed an integral part of the leased premises, and these were completely destroyed, as the Court will ascertain by the concordance of the testimony of both plaintiff's and defendant's witnesses. So far, at all events, plaintiff is authorized to discuss the law as to partial destruction of the leased premises.

But we repeat, as fully argued in our original brief, with an array of the highest authorities, that the cane crop in the ground, plant and stubble, forms an *integral part of the thing leased*, and that its total destruction in this instance was actually a destruction in part of the sugar plantation leased by defendant to plaintiff.

Does defendant meet this issue squarely in his brief? The Court is favored only with the *ipse dixit*

of his counsel; for they have not quoted any authority on the subject.

They however, acknowledge (Brief p. 11 :) "That *in the proper sense* the standing sugar crop is part of the sugar plantation, and belongs to the land, states only a natural and obvious fact." In the previous page, they hold that: "For *certain well understood purposes*, in cases of mortgage, forced sales and *other relations*, the fruits and crops are considered *part of the realty.* (*What other relations?*) But, add they, "to say, therefore, that the crop raised by a lessee for his own benefit, is, as between himself and the lessor, a part of the leased property, involves a paradox, which is simply grotesque."

Having assumed such extreme position, defendant consistently eliminates all discussion of the so-called grotesque proposition in its legal aspect, and refuses even a passing notice to the array of authorities, quoted by plaintiff. The High Court of Cassation, Marcadé, Troplong, and the other commentators, (who exhaustively interpret these articles of the Napoleon Code, from which are barrowed the provisions of the Louisiana Civil Code), are complacently left to hug the delusion of the "grotesque paradox;" for defendant will not as much as notice these high authorities in their unaccountable illusions.

Be that as it may, the jurisprudence is not only well established, but nowhere controverted that, *in the contract of lease*, the crop in the ground is an *integral part of the thing leased*, and that *each successive crop*, from year to year, comes under the same classification. Art. 465 (456) of Louisiana Civil Code, is simply the consecration of that principle when it declares: "Standing crops and the fruits of trees not gathered,

and trees before they are cut down, are likewise *immovable*, and are considered as *part of the land to which they are attached.*"

We refer the Court to our brief, pp. 8-10, which contains references to the jurisprudence on this subject *as regards the contract of lease*, and close by stating that defendant does not quote a solitary authority to the contrary, whether as to French or Louisiana jurisprudence.

IV. *Secondly*: *The destruction* of the crop by a fortuitous event, *vis major*, is not assimilated, in the contract of lease, to *the mere failure* of a crop. There is no warranty, on the part of lessor, for a good or against a bad crop, nor even against a total failure of crop. The distinction is between the destruction of a crop *vis major*, and the loss of a crop in the usual course of events, a distinction which obtains universally both in the Roman and French jurisprudence. The warranty of the lessor attaches when there is a *destruction* of the crop by fortuitous event, while it does not attach where there is a *mere diminution or failure* of the crop. These are but common sense ideas, and they are incorporated in the jurisprudence.

V. *Thirdly:* Defendant after conceding the total destruction of the crop in the ground, and of the number of bridges on the net work of canals and ditches, and at least the partial destruction of the drainage, concludes that the remedy of plaintiff was by "*repairs.*" Reconstructing all the bridges, digging anew all the ditches, renovating the canals, reinstating 175 acres of plant cane and 120 acres of stubble cane (which requires three successive years for that purpose), all this considered as objects of mere repairs! Says, Marcadé Vol, VI. p. 575, §. XIII: "In the case of par-

tial destruction, the lessee, who can never exact *the reconstruction* of what has been destroyed, may demand, on the contrary, in optioning for the continuance of the lease, the repair of what is only damaged; and it is in *confounding reconstruction works with works of simple repair*, that some authors have clouded this idea, obviously so simple."

At page 449, §. 1, he says: "If, therefore, there is a distinction between total and partial destruction, there is also between *partial destruction* and *simple damage*; for the three categories are regulated by law in a quite different manner; and that should be so. Total destruction (by fortuitous event) puts an end to the lease; partial destruction gives to the lessee the option of cancellation or of continuance of the lease on the remainder of the object with diminution of price; and ordinary *damages* allow cancellation to neither party, but only binds *the lessor*, according to paragraph 2 of Art. 1719, and paragraph 2 of Art. 1720, to repair the damages so as to reinstate the thing in good condition." See Louisiana C. C. Art. 2693 (2663).

This authority vividly establishes the distinction between partial destruction and ordinary damages.

The destruction by fortuitous event, of the whole standing crop of cane, of all the bridges, and of the whole drainage of this sugar plantation, does not present a case of ordinary damages, to be met with *mere repairs*, but gives rise to *reconstruction* of the bridges and drainage and to the *renovation* of the crop. As to growing a new crop of plant and stubble cane, this is not only an expensive and laborious operation, but it is a long one, *the result of years*. As stated in our original brief, (p. 2,) "When this crop (plant) is ripe, the cane is cut close to the ground, and, without fur-

ther planting, the roots left in the ground, sprout and makes another crop, which is called first year stubbles or rattoons, this crop is again cut close to the ground, and the roots furnish another crop, which is called second year stubbles or rattoons, and so to the third year."

So that Viterbo, who had planted in 1884, eighty-five acres of stand, and had cultivated 200 acres of stubble, would, after losing the whole crop of 1884, have been compelled to buy elsewhere and import, at enormous expense about one hundred acres of cane to plant on the Friedlander plantation, so as to have an ordinary crop of plant cane in 1885, with a downright impossibility of having any stubble or rattoon crop in 1885; but in 1886 and 1887 he would be able to obtain stubble and rattoon cane. And this expensively ruinous operation is assimilated to necessary repairs of ordinary damages by the lessee!

LOSS OR DESTRUCTION OF THING LEASED.

VI. First. The various articles of Civil Code of Louisiana on the destruction or loss of the thing leased are *in pari materiâ:* the loss or destruction being expressions of same legal import.

Defendant, however, after quoting article 2728 (2699), of Sec. 4, entitled: "*Of the dissolution of leases:*" (which article reads: "The lease is also dissolved by the loss of the thing leased,") gravely contends that the term "*loss*" here means "*disappearance from some unknown cause, beyond the reach, or use or control, and is most probably intended to refer to the lease of movables.*"

This is introducing a distinction, which the article does not warrant; and which, besides, is not justified

by the context of the whole section, treating of all the causes of the dissolution of leases.

In treating of C. N. Art. 1741 (the same as our article above quoted), Delvincourt simply observes: "*By the loss of the thing. See Art.* 1722,") which article is precisely our art. 2697 (2667) treating of total and partial destruction.

The legal definition of "loss" is either total or partial destruction. It is so considered in the Civil and Common law systems; and the word "loss" as a legal term in insurance matters is of universal application in that sense.

Without repeating our argument in the original brief as to total and partial losses, we contend that:

1. There was *a total destruction* of the leased premises, that is that the sugar plantation was destroyed *as a sugar plantation;* and the lease is at an end; but

2. If the above proposition be not conceded, that, at all events, the destruction of the crop, of the drainage and of the bridges amounts to such partial destruction of the leased premises, as entitles lessee to a cancellation of the lease.

"IMPEDED USE AND UNFITNESS FOR PURPOSE OF LEASE."

VII. *First.* This ground for cancellation is distinct from those arising from partial or total destruction of the thing leased; and is governed by rules, distinct from the special rules governing the demand of cancellation on account of the loss or destruction of the object. It does not come under the operation of C. C. Art. 2697 [2667], regulating total and partial destruction.

The solution is found in C. C. Arts. 2692 (2662), 2693 (2663), 2694 (2664), 2699 (2669), 2710 (2680), 2717 (2687), 2721 (2691), 2729 (2700).

VIII. *Secondly.* The ground is of a two-fold character. The first is that if there was not a partial destruction, but only damages resulting from *an accident*, the repairs must always be made by the lessor; and the lessee, having been put *in morâ* and refusing to comply, the right to cancel the lease results from the resolutory condition, implied in all commutative contracts, and expressly provided for in the contract of lease. (See our original brief, pp. 7, 16, 17).

Under C. C. Art. 2693 [2663], as quoted above, the lessor is always bound, during the continuance of the lease to make all the repairs which may *accidentally* become necessary.

The liability of the lessor is the general rule. The only *exception* relates to current repairs; "reparations locatives," which the lessee is bound to make, C. C. Art. 2716 [2686]. And even these which *exceptionally* fall upon the lessee, revert to the lessor, when, as provided by C. C. Art. 2717 [2687], they "are from *unforseen events or decay rendered necessary.*"

So that the *general* rule is the liability of the *lessor* for repairs; while the liability of the *lessee* is *limited* and *exceptional;* and *even in such exceptional cases*, the lessee is free from liability in the two contingencies of *decay* and *unforseen events.*

IX. The true ground, however, is distinct from the question of ordinary repairs, as it is also from that of loss or destruction.

The *lessor's warranty* is to *make* the lessee enjoy the leased premises, and for that purpose "to maintain the thing in a condition such as *to serve for the use*

for which it is hired." C. C. Art. 2692 (2662). (See on this point the authorities and arguments at pp. 6 to 11 of our original brief).

And it is the *obligation of the lessee* under the textual provisions, C. C. Art. 2710 (2680), "to enjoy the thing leased as a good administrator, according to *the use for which it was intended by the lease.*"

The contract between Friedlander and Viterbo contains express stipulations that the plantation shall be cultivated, during the five years' lease, thoroughly *as a sugar plantation*, and it clearly lays down the mode and manner of cultivating and saving the plant and stubble cane, of making and preserving the drainage, and finally, for the delivery of the leased premises, at the end of the lease, in a thorough state of cultivation *as a sugar plantation*, with requisite drainage and full stand of plant and stubble cane.

This lessor's warranty is to "maintain the sugar plantation in such condition that this lessee may enjoy it according to the intended use," i. e. a sugar plantation. Hence, under C. C. Art. 2699 (2669): "If without any fault of the lessor, the thing cease to be *fit for the purpose for which it was leased*, or, *if the use be much impeded*, the lessee may, according to circumstances, obtain the annulment of the lease."

We do not propose to argue again the above propositions, since they are elaborately treated in our original brief.

However, we must notice defendant's argument (brief, p. 11,) that the place has not ceased to be fit for a sugar plantation, because in the course of time *it may yet "be used for the purpose of growing cane and sugar; labor and expense are all that is required."*

When Louis XIV built Versailles, *labor and*

money were all that was required. And he transformed woods and waste lands into magnificent palaces, gardens and parks, simply with labor, and money,—and time!

It does not occur to defendant that his argument is based upon an anachronism. The leased premises may yet be made fit for the use intended in the lease. But are they now fit? And if they are at present unfit, but may be made fit, who is charged with the burden or obligation? And if the lessor has, by his warranty, as we have demonstrated, to maintain them in their required fitness, *a fortiori* must he reinstate them in their original condition when, without the lessee's fault, they have been rendered unfit. C. C. Art. 2693 (2663).

Of course waste lands and deserts may be transformed into fine plantations. Undoubtly by dint of *labor and money, and with much of the time* stipulated for the duration of the lease of the Friedlander plantation, plant cane may one year be grown there, and stubble the next and the succeeding years; and the net work of canals, ditches and bridges may be renewed and reconstructed. But before all this is done, it cannot be denied that the leased premises have ceased, in the meantime, to be fit for the purpose for which they were leased.

And what about the ruinous impediment in the enjoyment by the lessee of the use of the sugar plantation, as contemplated by the lease?

The Judge *a quo* could not but exclaim in his decision: The complainant's case is a hard one, and if the justification could be found either in Louisiana law or in the general principles of equity, I should be very glad to afford him relief."

Can a more onerous impediment befall a lessee?

Not only does he lose the immense outlay, which the evidence shows he incurred, but the first year he is deprived of all enjoyment whatever, and of the remaining four years he must, one year, renew the whole drainage, bridging and plant cane, and patiently wait for one and two years more to raise stubble and cane crops.

Is it possible to find a more exemplary case of impediment, which, under C. C. Art. 2699 (2669) and other articles *in pari materiâ* authorizes the cancellation of a lease?

Respectfully submitted,

CHAS. LOUQUE,
ALBERT VOORHIES,
Solicitors.

Supreme Court of United States.

No. 1089.

RICHARD VITERBO,

versus

SAMUEL FRIEDLANDER.

Brief for Defendant, Appellee.

IN EQUITY.

I.

The complainant demands the annulment and cancellation of a lease made by him for a term of years with the defendant, S. Friedlander, of a "Sugar Plantation," designated in the lease as the Friedlander Plantation, situated in the Parish of St. Charles, in this State.

The grounds of action are somewhat vaguely stated in the original bill (petition), and though amplified in the supplemental bill, are substantially retained with all their vagueness and inconsistency. But conceding to the complainant the utmost liberality of interpretation, we proceed to the discussion of the case, with the assumption that it presents for consideration two distinct propositions, not precisely, however, as

stated in the brief of counsel for complainant, but rather as follows, as gathered from the pleadings, to-wit:

1st. That the injury to the "Friedlander Plantation" by the crevasse was tantamount to a destruction of the property leased in this, that it made it "unfit for the purpose for which it was leased;" and

2d. That demand was made on the lessor to repair and restore the property, and his refusal "to maintain the thing in a condition such as to serve for the use for which it is hired," (see petition) annulled the lease.

The trouble was occasioned by a "crevasse" in March, 1884. The burden of complainant petitions, supplemental petitions and bills of complaint, (printed Record, pp. 1, 3, 5, 13) is that the leased plantation was thereby destroyed, or destroyed in part, or rendered "unfit for the purposes for which it was leased," etc., and therefore the lease should be annulled.

The existence of the "crevasse" and consequent overflow of the Friedlander Plantation (within the limits and to the extent explained) are virtually admitted and the case seems really solvable, on the face of the papers, especially as we might be justified in assuming from appellants brief, that counsel do not find fault with the facts found by the "master," but only with the conclusions of law on which the judgment was rendered. But the case was fully tried on the law and the facts, and we proceed to discuss it as the whole Record presents it. We do not, however, for reasons obvious from the nature of the case, deem it necessary to go minutely into the details of fact and evidence.

The masters report at page 24, printed Record, states them clearly and succinctly. The contracts on which the action arose are before your Honors, *in extenso*, printed Record, page 9, et seq. After taking the introductory facts and citing certain

clauses of the contract of lease to which the attention of your Honors is respectfully directed, he says:

"The damage caused by the overflow, I find from the evidence to be as follows: The lessee lost, by reason of said overflow, the entire crop of sugar cane for 1884, that is, the two hundred acres of stubble cane and the eighty-five acres of plant cane were destroyed, the ditches were partially, and in some places entirely filled; the canals, especially the one dug by the lessee, were partially filled and the bridges generally swept away, the water remained over the land until July, 1884, a deposit was left over the land of from three to six inches. To cultivate the lands as a sugar plantation the following year, 1885, it would require ditches to be redug, the canals to be opened or cleansed out, the bridges replaced, and seed cane to be obtained and planted—all at considerable expense—to put the plantation in the condition it was at date of the "crevasse." His Honor, the Circuit Judge, accepts these facts as justified by the evidence, and arguing from them dismisses complainants bill, giving his reasons therefor in an "opinion" so manifestly conclusive and logical in law and fact, embracing so complete a statement of the law of Louisiana applicable, that we might with confidence submit the case to your Honors on it. Record, page 101. As it is, we respectfully refer to it, and proceed to the argument as if the field were unexplored.

As stated both in the report of the master and the opinion of the Court, there is little dispute in regard to the facts of the case, and the inquiry limits itself to an application of the law to the facts.

That the plantation was overflowed is true; that the overflow left a moderate deposit, averaging possibly between four and six inches, may be admitted; that the deposits partly filled ditches and canals is natural, and that the sugar crop for the

year 1884 was destroyed in the ground is a fact which we have no intention to dispute; but that the "sugar plantation" remained and still exists with all its paraphernalia and essentials is as true as that the Mississippi river did not all go out through the Davis crevasse, but is left as mighty and as independent as before the "flood."

It is so patent that the partial or even total filling up of ditches and the partial filling up of canals, together with the deposit on the surface of the plantation, is neither a total nor partial nor "relative" loss or destruction of the thing leased, nor a rendering of it "unfit for the purpose for which it was leased," that discussion on these points strikes us as absolutely frivolous.

N. B.—Before proceeding with the discussion, we take occasion to state that in our *Appendix I*, at the foot of this brief, are contained all the articles of the Louisiana Code referred to by us and the learned Judge *a quo*, arranged according to number without regard to importance of application to this cause.

The sole questions in the case are as to the effect on the existing contract of lease of the loss of sugar cane in the ground and the refusal of Friedlander to "replace the eighty acres of plant cane, more or less, and the stubble, making in all two hundred and fifty acres of cane," as expressed in the letter to Friedlander by Chas. Louque, Esq., dated June 4th, 1884, and offered in evidence by the complainant; and the main questions involved under the first inquiry are fairly and fully embraced in the following interrogatories which we propound to ourselves, and which we think we can answer without difficulty:

1st. Is the loss of the sugar crop in the field, for 1882, which involved necessarily the seed cane and stubble in the field,

left or given, under the stipulations of the lease, a total or partial destruction of the thing leased, "by an unforeseen event," under Article 2697, which would entitle complainant to a diminution of rent *or* a cancellation of the lease?

2d. Has, by reason of the loss of said crop, the thing leased "ceased to be fit for the purpose for which it was leased" to entitle complainant to relief under Article 2699? (We ignore that portion of this article referring to 'impeded" use as utterly inapplicable to the case.)

3d. Does the failure or loss of said crop, involving the loss of the cane left by the lessor, constitute the loss of the "thing leased," under Article 2728?

These queries involve a fair and, we think a comprehensive statement of this part of complainant's case. On the affirmative response to one or all of them he must stand; if they are properly answered in the negative, complainant is not entitled to relief.

We will show that each of the Articles to which the questions are framed contemplates a special and particular state of facts. our learned adversaries have drawn from them indiscriminately, as if they could be taken together or meant one and the same thing. They are in palpable error. They refer to the same subject and tend to the same end, but on different lines and from different causes.

For the sake of clear statement, we placed the articles in the order of their force and applicability to the case; for the sake of the discussion, we will reverse it, taking up the last first.

Is complainant entitled to revocation of the lease under Article 2728, which provides that the lease "is dissolved by the loss of the thing leased?" Clearly, even if the loss of the crop could be held the destruction of the thing, this article would

have no application to the case. It is obvious that the word "loss" is used in its ordinary signification, meaning its disappearance from some unknown cause, beyond the reach of use or control, and is most probably intended to refer to the lease of movables, which is expressly provided for in Articles 2676 and 2678 R. C. C. At any rate, it means the virtual and physical going out of existence of the thing leased, and contemplates a different state of facts from that to which Articles 2697 and 2699 relate. Unless Article 2728 does simply refer to such cases, and probably mainly the actual total loss of some "movable" thing, it is a mere repetition, for the "destruction" of the thing is provided for in the language of Article 2697. But with proper deference to our learned adversaries, who lay great stress upon the application of this article, we think it is time and thought wasted to discuss it in detail. There may have been a partial or "relative" destruction, or a serious impeding of the use of the thing, but the thing leased is not lost. Complainants, therefore, must find relief, if it is to be found at all, under Article 2697 or Article 2699.

Going backward in the order which we have proposed to ourselves, we will take up the question, whether the thing leased "has ceased to be fit for the purpose for which it was leased," to such an extent as to entitle the lessee to a dissolution of the lease under Article 2699. A comparison of this article with Article 2697, which we will not now enter upon, and which we suggest merely by way of illustration, shows the extreme caution with which the law-maker attempts to provide for every possible contingency or conflict which may arise between the lessor and lessee. Both the reason and the necessity for this are obvious. The relation is so common and the field for controversy so great that the law-maker probably thought that the surest way to cut off disputes was to make explicit provision in law for every case which human judgment could foresee. If this is correct, and the text of the law and

the spirit of jurisprudence bear us out, it must follow that every article must be limited in its application to the case clearly embraced in it; and, also, when we find a provision of law directly meeting a given case, that the right or remedy there provided is exclusive of all others.

While these Articles, 2697 and 2699, go together to a certain extent, as *being in pari materia*, each provides for a particular class of cases, and a case controlled by one of them must remain unaffected by the other. Now, it seems very clear *that the Friedlander* Plantation "has not ceased to be fit for the purpose for which it was leased." It may be that the ditches and canals will have to be cleaned out (we will not admit that they must be "dug out" as anew), to secure proper drainage. But with the simple and usual "restoration" and the putting in of seed cane instead of relying on "stubble," the sugar plantation is complete. The soil is there in arable condition; the buildings, stables, fences are there; the live stock and all the implements are there.

We will discuss somewhat more fully, under our third and last query, the effect of the loss of the sugar crop, seed, cane and stubble. For the present purpose, dealing under Article 2699, we may be pardoned for relying upon the common and practical sense view of the situation, that a sugar plantation has not ceased to be fit for raising and cultivating cane because the drainage ditches and canals need repair, and the growing crop has been destroyed so as to leave the planter without seed or stubble cane.

Besides, this article seems to contain only a sort of equitable provision: the conclusion is left to the discretion of the Court. It says: "the lessee *may, according to circumstances*, obtain the annulment of the lease. The Article 2697 makes provision for total or partial destruction, in certain cases: unless your Honors finds that the thing has *totally ceased to be fit*

for the purpose for which it was leased, the lessees' remedy must be under said Article 2697. And so by a process of elimination, point by point, we think we have successfully reduced the inquiry to the answer of the question whether complainant is entitled to relief under said Article 2697.

Let us for the purposes of certainty and precision, embody here the article in full:

Article 2697. *If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease.* In neither case has he any claim for damages." The first part of the article, which relates to the *total* destruction, we dismiss from the discussion. We have read of poets giving to "airy nothings" a local habitation and a name but the most astute Iconoclasts have never yet been able to turn *something into nothing*. But it is claimed that the destruction is *total* because an *essential* part has been destroyed. (Let it be understood that we are now answering our ingenious friends on the theory that Viterbo's growing crop was a *part* of the thing leased, which, as fact and law, we deny).

If that were total destruction, there could be no partial destruction. The whole is composed of all its parts: at best, the sugar cane *is* a part of the sugar plantation. What then? The thing leased is "only destroyed in part." But in order that this destruction "in part" should entitle the lessee to relief, it must be the result of "unforeseen event," and the Supreme Court of the State has decided, in three different cases, that the cause of destruction charged by complainant was not an "unforeseen event," and has refused in such cases, to allow to the lessee, the diminution of rent otherwise permitted by the article.

They are cited in the opinion of the Circuit Judge, who introduces them in the following manner. Record page 103—"However this may be, it is the settled jurisprudence of the State of Louisiana that crevasses and overflows are not unforeseen accidents." (Events?)

Vinson vs. Graves, 16 La. An. 162; Mason vs Murray, 21st La. An. 535; Jackson vs. Michel et al., 33rd La. Ann. 723. "And," continues the learned Judge, "this is in accordance with the natural state of things as they exist in the alluvial portion of Louisiana, where the plantation in question is located."

The point involved is so clearly and unequivocably met in these cases, that there is barely room for comment.

Our learned friends consider the alternatives of asking "diminution of rent" or "revocation of the lease" to be at the option of the lessee. This is our contention, and we submit that on the same principals on which the Supreme Court of this State has refused to allow a diminution of rent, the lessee is not entitled to the revocation of the lease, always assuming the thing to be "destroyed only in part." The greater includes the less, if there is not cause enough for diminution of rent, there certainly is not for dissolution of the lease.

So, then, assuming, for the sake of argument, that there has been a "partial destruction" of the thing leased, caused by a crevasse, the law of the case is settled adversely to the pretensions of complainants.

It seems to us that we have demonstrated to almost mathematical certainty that every one of the three contingencies relied on by complainant turns against him. The "thing" is not lost; it has not ceased to be fit for the purpose for which it was leased; it is certainly not destroyed in whole; and if "in part," the partial destruction happened under circumstances which do not entitle him to relief.

Our learned friends cite Troplong with evi lent satisfaction. Sec. 211, "Du Louage des choses," will show that he is exactly in accord with our jurisprudence. An interruption to the enjoyment from something which is not an "unforeseen event" entitles the lessee to no relief, and he cites a familiar illustration of a water-mill compelled to suspend action during spells of dry weather.

We had intended to devote particular attention to the zealous efforts of our friend to prove that the crop is a part of the land or the thing leased; but on very little reflection the learned discussion submitted by counsel for complainant strikes us as making rather much ado about nothing. For certain well understood purposes, in cases of mortgage, forced sale and other relations, the fruits and crops are considered part of the realty. It is wholly unnecessary to follow counsel through his refinement for the purposes of this suit. If the crop was a part of the land, why there was a destruction in part of the property leased; but under the article and the decision cited that does not entitle complainant to relief.

But, with all due respect to our learned friends, the argument is simply a piece of extravagance. As well claim that the seed of the cotton which is annually planted, but without which no cotton plantation can exist, is a part of the cotton plantation. Suppose such a crevasse were to happen during the last summer of the lease, the rent presumably would be paid, for it is payable in advance. Could Viterbo sue for restitution or diminution? The supreme Court say he could not. He would not care to sue for dissolution; yet his legal rights now can be no greater during the first than the last year. And in what sense could such a crop be said to belong to the lessor? When does the lessor's right end and the lessee's begin? It is impossible to follow this argument in detail. There is such gross and patent fallacy through it that we can

leave it with the Court on the bare statement of it. That in the proper sense the standing sugar crop is part of the sugar plantation and belongs to the land, states only a natural and obvious fact; but to say, therefore, that the crop raised by a lessee for his own benefit, is as between himself and the lessor, a part of the leased property, involves a paradox which is simply grotesque.

The facts of the case, to which the principles of the decision in Vinson vs. Graves are to be applied, are stated with crushing simplicity by His Honor, the Circuit Judge, his "opinion." (Record, page 104.)

"The facts in the case do not warrant the finding that the place has ceased to be fit for a sugar plantation. It is incontestible that it can be used for the purpose of growing cane and making sugar; labor and expense are all that is required, and I take it they are always required, and this place can differ from others in that respect only in requiring more of each."

We need not argue that your Honors will decide this case strictly according to the jurisprudence of Louisiana. It must be governed entirely by the local law. In view of the fact that "overflows" or "crevasses," of the Mississippi River in the "bottom-lands" of Louisiana, principally devoted to the cultivation of sugar, are common, ordinary events, liable to occur any season, the Supreme Court of the State has held them to be not "unforeseen events" and has thus established a rule of property, or of legal interpretations of the respective rights and obligations, of lessor and lessee, of predial estates, which we know, from traditions and the findings of this Honorable Court, your Honors would not disturb even if it were possible, that, on original consideration, you might reach a conclusion adverse to that fixed by the jurisprudence of the State.

II.

It is contended that the lease is dissolved by the "resolutory condition"—*i. e.*, that the lessor has "not maintained the thing leased as a sugar plantation for the whole of the first year and for subsequent years also," etc.

We will not say anything particularly about the absolute inconsistency of this plea with the demand for rescission on the ground of loss or destruction of the property. Clearly complainant could have been forced to elect between the two; but, in our opinion, this matter was never seriously considered until all hope vanished on the other. It is not necessary for us to show that a lease cannot be dissolved in this manner; but we do say that an executed lease, the lessee being in possession of the leased premises, cannot be dissolved on the grounds stated.

We enter the discussion of this branch of the case with the proposition, that wherever the Civil Code specifies what in a given state of facts the lessor or lessee may or shall do, the remedy given or duty imposed is peremptory, and exclusive of all others. The plain point on which complainant relies must be that the lessor did not make the necessary repairs.

We deny at the outset, *in toto*, that the lessor of a predial estate is bound for repairs or restorations of any kind. The Code makes special distinction of the "letting out of things" into two kinds, to-wit:

1st. The letting out of houses and movables.

2d. The letting out of predial or country estates.

Article 2676. "Movables" may be let "excepting those which cannot be used without being destroyed by that very use." Art. 2677.

Now the Code, in defining what repairs respectively fall on the lessor and what on the lessee, evidently refers to the "lease of houses." Art. 2716.

Not a single specification in this article can possibly refer to anything but urban property. Where it is doubtful upon whom the repairs fall, the presumption is that the lessee must make them. Arts. 2715, 2717. This latter article provides that repairs made necessary by *unforeseen events* must be made by the lessor; showing the rule to be that the lessee is charged with repairs.

And in this connection, let it be remembered that the repairs made necessary to the plantation do not come from an *unforeseen event.*

This point, too, is explicitly met by the Circuit Judge "Opinion," page 105.

"There is no adjudicated Louisiana case cited that supports the complainant's demand for annulment of the lease on the ground that the defendant has failed to comply with the obligations of the contracts.

The Louisiana cases cited by the Master are adverse. Dussman vs Gineas, 6 A., 279, and 12 A., 823.——"

The learned Judge then proceeds to show that the French authorities relied on by Counsel for complainant, do not sustain their propositions.

We lay stress upon these findings of the Circuit Judge because we know his positive statements as to the Law of Louisiana, on the points presented, will be received by your Honors with the greatest regard, though you may not permit yourselves to accept them finally without personal investigation; a regard, enhanced by the fact that he administered the law of Louisiana for many years, as Judge of one of her Civil Courts.

But, resuming the thread of our discussion, we submit and repeat here, that the cane given or left on the place, as expressed in the contract of lease, to which your Honors will refer, never was a part of the leased property or thing. It could not be leased, because it is destroyed in the use; it had already

completely lost its identity when the crevasse occured. The lessee is not bound to *restore* it, but to *replace* its equivalent. As to the canals and ditches, they are mere incidents to sugar planting; they are wholly and entirely under the control, we might say option, of the lessee. If the lessor were to attempt to do something, he could not proceed on any certain standard. What he might consider sufficient would probably not satisfy the lessee, and at once a complication would arise which the law does its utmost to prevent.

The lessor, it is true, has repudiated in terms the demand on him to restore seed and stubble cane.

The theory upon which this refusal is made is clearly shown in the whole defence to this suit. We claim that it is no part of the thing leased. Under no circumstances, therefore, is the defendant bound to restore or repair what was at no time a part of the thing leased.

In addition to this, the important stipulations of the contract of lease that the lessor leaves or gives to the lessee the growing cane crop, "stubble" cane, one hundred and eighty-five cords of wood, etc., *to be used* and to be returned in kind or equivalent at the expiration of the lease is conclusive that after these things had been received by the lessee the lessor has nothing more to do with them.

The master, in his report properly calls that part of the agreement a contract of exchange governed by Article 2660. Civil Code. After *delivery* the things delivered were at the risk of the lessee.

But referring to both, the demand for restoration of seed, "stubble" cane and that for repair of canals and ditches, the latter of which we have already shown to be a part of the ordinary and necessary routine of planting, we submit that even if the lessor were bound for them, his failure to make them or have them made would not entitle the lessee to a

dissolution of the lease. We asserted at the outset on this branch of the cause the proposition that wherever our Code provided particular rights or remedies, as between a lessor and lessee, these are exclusive of all others. We submit now that this is particularly true in regard to repairs. Article 2694 R. C. C. gives to the lessee a full, simple and adequate remedy. Having put the lessor in default, he may cause the repairs to be made and withhold the cost from the accruing rent. The motive and the reason of this provision of law are apparent; the contract itself is not to be placed in jeopardy by the mere whims or notions of either party as to what are repairs to be made by the lessor or lessee. Nor can the fact that repairs are not made by the lessor when called upon to make them be turned into a case of "impeded use" of the thing, as urged by our learned friends. Viterbo's use and enjoyment of the leased property is absolute; there is no threat of eviction, no disturbance of possession, no interference with the use of the plantation in any sense of the word.

On this point, the remedy of the lessee when the lessor fails to make repairs, and the only remedy, we refer your Honors to 26 An. 384, Winn vs. Spearing; and 28 An. 903, Welham vs. Lingan.

We feel satisfied in our minds that your Honors will consider all these discussions about resolutory conditions, "impeded use," refusal to maintain the leased property in a condition fit for use, etc., as either entirely foreign to the case, or at best as incidents to the main question whether the plantation "has been destroyed in whole or in part by an *unforeseen event:*" in other words, we are brought back to this as the controlling, if not the one single issue in the case. We think we have fully disposed of that. In addition to what we have said, we respectfully refer your Honors, by permission, to Appendix I, an able treatise on the "Law Governing Leases of Predial Estates" in Louisiana, lately prepared and published, by a member of

the New Orleans bar. The subject is well considered and the conclusions of the author enforced by authorities of controlling influence on questions of civil law.

Nothing remains to be said except that on general principles the dissolution of the contract of lease is not favored by the law and is awarded only in clear and extreme instances. In support of this we cite the following from the case of *Dusnau and Husband vs. Generis*, 6 An., page 279.

"The plaintiff leased to the defendant a dwelling house in the city of New Orleans for the term of one year, to-wit, from 1st of November, 1848, to 1st of November, 1849. In the early part of May, 1849, a crevasse occurred a few miles above New Orleans. The water of the Mississippi overflowed the rear of the city and covered the pavement and banquette in front of the house occupied by the defendant. * * *

The defendant removed his furniture and abandoned the house in the month of May. * * * *

The plaintiff having waived any claim for rent during the inundation, the only question presented for our consideration is whether, under the circumstances, the defendant had a right to consider the lease dissolved.

There is no express provision in our legislation for a case of this kind. But a consideration of the provisions of our Civil Code on the subject of letting and hiring, with reference to their general spirit and intendment, leads us to the conclusion that the law giver did not contemplate the dissolution of leases, except in extreme cases, but rather an equitable indemnity to the tenant for a temporary inconvenience sustained unexpectedly and without the fault of the lessor. And in this respect it harmonizes with the spirit of the Roman law and that of France. Le fait de force majeure dont se plaint le preneur, says Troplong, doit lui occasioner un dommage grave. *Si plus quam tolerable sit*, disait le jurisconsulte Ganis; sans quoi une simple gene, un legere diminution des advantages du bail ne

serait une cause de resiliation. It will be observed that in the present case the lessee was not deprived absolutely of the use of the premises. He was subjected to inconvenience, it is true; but the house was still habitable. Moreover, the inconvenience was not of such a character as to menace discomfort during the entire term. It was temporary and such as in the ordinary course of things must entirely disappear long before the expiration of the lease."

And in the case of Denman vs. Lopez, 12 An. 824, it is said: "It appears to us that defendants cannot base a claim for relief on Arts. 2665, 2667 or 2669. The provisions of our laws on letting and hiring do not favor abrogation of leases when the loss or inconvenience is not caused by the fault of the lessor, but specific indemnity as the proper remedy except in extreme cases.

This was the doctrine of the Court in the case of Fanny Dussnau and Husband vs. L. F. Generis, 6 An. 279, where the tenant suffered a temporary inconvenience from the overflow produced by a crevasse, and also in the case of Dodville vs. Amat, 6 An. 566, where the adjoining proprietor found it necessary to demolish the party wall in order to erect a more substantial one to to suit the character of the building he was about erecting. In the case of Pontalba vs. Dominique et als., 11 L. 192, it was held that the lessee was bound to allow the necessary repairs to be made on the leased premises, but may have an allowance for the suspension of the rent for the time he is obliged to quit for this purpose. The case of Caffin vs. Redon, 6 An. 487, quoted in defendant's brief, was decided in favor of the lessee, because there was an original defect in the construction of the building, and a part of the building had to be reconstructed; the lessor's implied warranty was violated, and the lessee had the right to demand the dissolution of the lease. In the case at bar there was no original or latent defect in the building; but repairs became necessary from a cause independent of the control of the plaintiff."

We have not, in any part of this brief, deemed it necessary to comment on the evidence in this case. The salient facts are really indisputable. We only differ in our application of the law to them. So much of the testimony as consists of the opinions and declarations that "the plantation is destroyed as a sugar-plantation," because of this or that, etc., we consider simply worthless because it involves conclusions which it is the sole province of the Court to reach. The plain facts appear even from complainant's own testimony to be that, leaving out the matter of the loss of the crop, the injury to the plantation itself by the deposits is comparatively insignificant. They themselves inform us that one of the canals on the plantation was not there when Viterbo leased it; it was, therefore, put there for his convenience and use, and the lessor has nothing to do with it; and as for the ditches, the evidence is that a little more than the usual labor, and *not more* than was done when Viterbo first took possession, would re-establish proper drainage.

We confidently submit, therefore, that the decree of the Circuit Court, dismissing plaintiff's complaints, should be affirmed. We think we have shown that complainant is not entitled to have the lease annulled by reason of an act of omission or commission of the lessor, or, as he puts it, because the lessor did not fulfil his part of the obligations of the contract; he is not entitled to relfef under Art. 2728, because the "thing" is not lost. We have shown that he cannot have judgment under Art. 2699, because the "thing has not ceased to be fit for the purpose for which it was leased," nor is its use impaired; and, finally, we have shown, if there was any "partial destruction" (which, as fact, we deny), complainant's rights, must be adjusted under the Art. 2697, and on this the jurisprudence of the State is settled that the alleged destruction is not the result of an "unforeseen event," and the lessee would, therefore, not be entitled to the relief prayed.

All of which is respectfully submitted,

GEO. H. BRAUGHN.
CHAS. F. BUCK,
Solicitors for Defendants.

APPENDIX.

I.

FROM A TREATISE, ENTITLED

A FEW WORDS

ON THE

LAW GOVERNING LEASES OF PREDIAL ESTATES

IN

LOUISIANA.

BY ARMAND PILIÉ, ESQ.

I.

"That the lessee of a predial estate is not entitled to an abatement of the rent under the plea of a partial or total destruction of his crop by fortuitous events, is no longer an open question, in view of the peremptory and unequivocal decisions to that effect in 16 A. 162, 21 A. 535, and 33 A. 723.

The rule—apart from the legal grounds on which it is made to rest, and which will be found in the second part of this argument—which denies to the farmer any abatement of the rent under the above circumstances—except in the cases provided for in Art. 2743, 2744 of the Civil Code, in the interest of agriculture, but in utter derogation of the principles of the contract of lease—is in accordance with the dictates of equity and fair dealing.

"His in an aleatory contract, for, knowing full well the eventualities which may jeopardize if not annihilate the results of his labor and husbandry, he yet agrees to pay a fixed price for rent. Why, then, relieve him from his obligation in case of partial or total loss?"

Besides, if when he raises a large and remunerative crop, the profits are his, and his only, why should the lessor be made to contribute to the loss resulting from a short one, or when none is made?

For similar reasons, the vendee of an uncertain hope will not be exonerated from the payment of the price, even when he acquired nothing by the venture; for C. C. 2451: "If a fisher "sells a haul of his net before he throws it, although he should "catch nothing, still he will be entitled to the purchase money, "because it was a hope that was sold, together with the right "to have what might be caught."

II.

But is Art. 2699 of the Civil Code applicable to leases of overflowed predial estates? That article reads as follows:

Art. 2699. "If, without any fault of the lessor, the thing "cease to be fit for the purpose for which it was leased, or if "the use be much impeded, as if a neighbor, by raising his "walls, shall intercept the light of a house leased, the lessee "may, according to circumstances, obtain the anulment of the "lease, but has no claim for indemnity."

It might be a sufficient answer to say that leases of predial estates are governed exclusively by the particular rules contained in Articles 2743 and 2744, and that the Supreme Court by holding, in Vinson vs. Graves, 16 A. 162—*where it was specially alleged that the defendant's land was by the overflow, rendered unfit for the purpose for which it was leased*—that the defendant was entitled to no abatement of the rent, has thereby tacitly but virtually decided that the overflow of a predial estate does not render it unfit for the use for which it was intended.

Let me, however, endeavor to show that such is the rule according to the strictness of the principles governing the matter of contracts of lease.

When, in common parlance, I say that I have insured my house or steamboat, neither of these things is actually insured, but what is really insured is my interest in either or both of them.

Likewise, when I say that I have rented a house or a plantation, the object of the contract is neither of these things, but is, in the first case, a right of habitation, and in the second, the right to gather and appropriate the fruits to be raised from the estate.

With the right of habitation, the lessee knows beforehand that he is entitled to be protected from the enclemencies of the

weather; to be furnished with the necessary means of entrance and exit, with air and light, etc., etc.; and if any of these requisites should be found wanting, even without the fault of the lessor, the right of habitation, and therefore the house itself becomes unfit for the use for which it was leased, and the lessee can, according to circumstances, obtain the annulment of the lease. C. C. 2699.

On the other hand, the lessee of a predial estate, in view of the many eventualities which may befall his crop, is entirely in the dark as to the *quantum* of the fruits he is to reap, and though he should gather a few or none at all, will not, on that ground, be permitted to obtain the annulment of his contract.

Pothier, when examining the effects of the agreement whereby the lessee stipulates that he shall take all the chances and run all the risks of all *foreseen and unforeseen* events, thereby waiving all right to an abatement of the price of rent in any eventuality whatsoever, inquires: "But if the farmer lose all or part of his crop, is not the contract without consideration?" To which he answers in the negative, for, says he, "*the consideration is not the fruits, but the uncertain hope of gathering the same.* Pothier, du Louage, No. 178.

If, therefore, the uncertain hope to collect the fruits, and not the fruits themselves, is the object of the lease of a predial estate, it is evident that the lessor's obligation was fulfilled from the moment the right to gather and appropriate the fruits was, by him, conveyed over and warranted to the lessee, who, on his side, and in the absence of any adverse claim or obstruction to the exercise of said right, will be expected or compelled to perform his part of the contract by paying the full rent, and that, without considering whether he has lost part or the whole of his crop, or made none at all.

But that that right to the fruits should not be a mere abstract and barren claim, it is also made to comprise the further right—also guaranteed by the lessor—to the enjoyment and use of the estate itself whereon the fruits are produced and harvested. Hence, should a material part or the whole of that estate be destroyed by an unforeseen event, the lessee, C. C. 2697, may either demand a diminution of the price or a revocation of the lease, even though the crop taken off of what remains of the land should have been so large that no loss had actually been suffered by him. Duvergier, Vol. 4, p. 155 and 156.

On the other hand, when the premises are left entire, or substantially unaltered, the farmer will not be admitted to pretend that, relativeiy speaking, they have totally ceased to

exist either as a sugar, cotton or rice plantation, as the case may be, by reason of the *momentary impossibility* of applying the same to the culture of those agricultural products, *if the fortuitous event which has brought about this state of things was one of those that occur at stated and well known periods, and in prevision of which, therefore, the parties must have contracted.*

On this point, Marcade expresses himself as follows at page 450, II, of the sixth volume of his work:

"The lessee would be entitled either to the annulment of the "lease, or an abatement of the rent, or would be momentarily "exempted therefrom, if such deprivation was caused by a for- "tuitous and *unforeseen event. But should it prove to be one* "*of those that occur periodically at stated intervals, and under* "*the same circumstances, so that the parties must have contracted* "*in prevision thereof, then the lease will stand, and must be rigor-* "*ously enforced.*"

And, by way of illustration, the great commentator and jurist proceeds to remark, "that where a mill driven by water "power from a stream liable to dry up at certain times has "been let out, the contract will be upheld, notwithstanding "the intermission in the supply of the motor."

Again, in the words of Aubry and Reau and Duvergier—high legal authorities all—it is laid down "that a lease will "only be dissolved by such a fortuitous event or accident as "would *absolutely* and *invincibly* deprive the lessee of the use "and enjoyment of the thing leased." See Aubry and Reau, Droit Civil Français, Vol. 4, p. 495 and Duvergier, Droit Civil Français, Vol. 3, No. 524.

Nay, more, Laurent, a lately risen star in the legal firmament under whose brilliancy the light of many of its predecessors has been made to pale, goes further and declares "that when "a farmer's crop has been destroyed by an *overflow, he* "*will not be heard to plead that he has thereby been prevented* "*from using and enjoying the thing leased, for there has been no* "*hindrance to his enjoyment thereof, and he has only lost the* "*fruits of the enjoyment or use.*" Laurent, Cours de Droit Civil, Vol. 25, page 511.

Now, the premises considered, and when it is borne in mind that the effects of an inundation are only of a temporary nature, and that this State is ordinarily and periodically subjected to *crevasses*, the conclusion is irresistible that Article 2699 of the Civil Code is without application to leases of overflowed predial estates, and that the same will be maintained and enforced, the overflow notwithstanding.

Nor, under these circumstances, could the resolutory condition of Article 2046 of the Civil Code be pleaded in avoidance of the contract, since, for the reasons and in the manner herein above set forth, the lessor would then be held to have complied with all the obligations imposed upon him, as such, by law.

* * * * * * *

4. That the lessee will be bound to clean out the ditches and canals at his own cost, as will be shown, in the absence of any textual provision on the subject, either in the Code Napoleon or our own, by reference to Pothier. du Louage, No. 224, Ruelle, Manuel des Propriétaires, No. 546, such duty devolving on the lessor only when rendered necessary by reason or an *unforeseen event.* Civil Code, 2717.

Such, I verily believe, is the law on the subject matter."

APPENDIX II.

Containing in the order of their numbers in the Code, the articles of the Civil Code cited in this cause by Counsel for appellee and by the master and the Honorable, the Circuit Judge, in the "opinions" delivered by them—also those cited in Appendix I.

Article 2046. (2041.)—A resolutory condition is implied in all the commutative contracts, to take effect, in case either of the parties do not comply with his engagements, in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, deemed a specific performance.

Article 2615. (2593.)—The adjudication can only be made to a bidder present, or properly represented. The person who bids in the name of another, without sufficient authority to bind him, is considered as having bought on his own account, and is answerable for all the consequences of the adjudication.

Article 2616. (2594.)—Sales which are made by authority of law are of two kinds.

1st. Those which take place when the property of a debtor has been seized by order of a court, to be sold for the purpose of paying the creditor.

2d. Those which are ordered in matters of succession or partition.

Article 2671. (2640.)—The price should be certain and determinate, and should consist of money. However it may consist of a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.

Article 2676. (2646.)—The letting out of things is of two kinds, to wit:

1st. The letting out houses and movables.

2d. The letting out predial or country estates.

Article 2677. (2647.—He who grants a lease is called the *owner* or *lessor*. He to whom a lease is made is called the *lessee* or *tenant*.

Article 2678. (2648.)—All corporal things are susceptible of being let out, movable as well as immovable, excepting those which cannot be used without being destroyed by that very use.

Article 2695. (2665.)—The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent it being used even in case it should appear he knew nothing of the existence of such views and defects at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

Article 2697. (2667.)—If, during the lease, the thing be destroyed by an unforeseen event, or if it be taken for the purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price, or a revocation of the lease. In neither case has he any claim for damages.

Article 2699. (2669.)—If, without any fault of the lessor, the thing cease to be fit for the purpose for which it was leased, or if the use be much impeded, as if a neighbour, by raising his walls shall intercept the light of a house leased, the lessee may, according to circumstances, obtain the annulment of the lease, but has no claim for indemnity.

Article 2717. (2687.—The expenses of the repairs, which unforeseen events or decay may render necessary, must be supported by the lessor, though such repairs be of the nature of those which are usually done by the lessee.

Article 2728. (2699.)—It is also dissolved by the loss of the thing leased.

Article 2798. (2769.)—If the debtor should fail, or be in a state of insolvency, the capital of the constituted annuity becomes exigible, but only up to the amount at which it is rated, according to the order of contribution amongst the creditors.

IN THE

SUPREME COURT,

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

NO._____ORIGINAL.

Ex-parte in the matter of the petition of
HOLLON PARKER,
for a Writ of Mandamus.

The Supreme Court of the Territory of Washington:
The Honorable ROGER S. GREENE, Chief Justice, and the Honorables S. C. WINGARD, JOHN P. HOYT and GEORGE TURNER, Associate Justices thereof,
Respondents.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Hollon Parker respectfully shows to this Honorable Court:—

First, that he is a citizen and resident of the city of Walla Walla, county of Walla Walla, and Territory of Washington.

Second, that on or about the 23rd day of April, A. D. 1877, Timothy P. Denney as plaintiff commenced a suit in equity against this petitioner and one John F. Boyer, as defendants, in the District Court of the First Judicial District of Washington Territory, in and for Walla Walla county; that the purpose of said suit, as shown by the *amended complaint* filed therein, was to obtain a decree of the said Court declaring the defendants therein to be the holders respectively and separately of the legal title of divers separate pieces and parcels of real property located in said county of Walla Walla, Washington Territory, in trust for the use and benefit of said plaintiff Denney; each of the defendants in said suit as aforesaid were charged in said *amended* complaint *separately* as to the different pieces and parcels of said property: Such *amended complaint* further sought to compel petitioner and said Boyer, the defendants therein, to convey the different pieces of property so alleged to be held by them separately and respectively, to the said plaintiff Denney; and also for a general accounting between said plaintiff Denney and this petitioner as one of the defendants therein, and for a judgment against this petitioner individually, as on a money demand, for the sum of eight thousand dollars ($8,000) gold coin and interest.

The said John F. Boyer made default in said suit, not appearing therein either personally or by attorney, and on December 21st, 1877, an order of default was entered therein by said District Court as follows:

"TWENTY SECOND JUDICIAL DAY—FRIDAY, DECEMBER 21, 1877.

TIMOTHY P. DENNEY,
Plaintiff,
vs.
HOLLON PARKER AND JOHN F. BOYER,
Defendants.

In this action the defendant, John F. Boyer, having been regularly served with process and having failed to appear and answer herein, and the time allowed for answering having fully expired, and there being no answer on file on the part of said defendant, the default of said defendant is now here duly entered by order of the Court.

(Signed) S. C. WINGARD, Judge e. c."

This petitioner appeared therein, and on June 23rd A. D. 1877, filed a demurrer to the original complaint filed therein, and for grounds stated in said demurrer that such original complaint did not state facts sufficient to constitute a cause of suit.

This demurrer was overruled by the Court and petitioner, as defendant therein, duly excepted at the time, which exception was allowed by the Court; all of which will fully appear from the record in said cause.

This petitioner, then as one of the defendants, filed an answer therein:

That the *original* complaint filed in said cause sought relief *as to only one specific piece of real property*, the legal title of which, it was therein averred, was in the defendant John F. Boyer, and it was alleged that he obtained title thereto wrongfully and fraudulently through a conveyance or conveyances from the petitioner as the attorney in fact, and also as the

grantee of the plaintiff, Denney; and it was claimed *only* and *solely* in such original complaint that he, defendant Boyer, be compelled, on certain conditions, to re-convey the said piece and parcel of land which was therein specifically described, to Timothy P. Denney the plaintiff therein. No accounting whatever from petitioner, or between petitioner as one of the defendants therein and the plaintiff Denney, was sought or in anywise demanded by such *original* complaint, nor any judgment or decree of any character whatever was demanded therein against petitioner.

That the answer so filed by petitioner as one of the defendants in said suit to such *original* complaint, after making full denials of the alleged wrongful and fraudulent conduct set out in said original complaint proceeded further in the nature of a cross-bill or cross-complaint, as under the statutes of Washington Territory he of right, might or could do, in which it was averred among other things that this petitioner had been for about four years preceding the commencement of said suit, and from about the month of May A. D. 1873, continually acting as the duly authorized and empowered agent and attorney in fact and trustee of the plaintiff Timothy P. Denney; and as such, had during all said time, had charge of, not only the real estate in reference to which relief was sought against the defendant Boyer, in the *original* complaint, but also various other pieces and parcels of real estate, including the *whole* of the real property owned by the plaintiff Denney, and also a large amount of personal property, including also evidences of debts owing to him, Denney; with full authority and directions from said Denney to care for and manage all said property, with full power to mortgage, sell and convey the same, and collect all debts due and demands owing to said Denney, and from the proceeds of such mortgage, or mortgages; sales and collections, to pay and discharge various debts owing by said Denney to divers persons.

And further, that in the performance of such trust, which trust it was alleged in such answer was in all respects faithfully and honestly performed, petitioner averred he had advanced and paid out to divers persons and at divers times during the performance of said trust for the use and benefit of said Denney, large amounts of money, to-wit: In the aggregate the sum of $3,475.91 in gold coin, in excess of moneys received by petitioner from the proceeds of said trust and of the property of said Denney so managed by him.

It was in said answer averred further by this petitioner that it was agreed by and between the plaintiff Denney and this petitioner, when said trust was created, that this petitioner should receive for his services therein a reasonable compensation, no specific amount being fixed, and furthermore was it averred therein that the services of petitioner performed in the execution of said trust were reasonably worth the sum of $3,482.38; and such answer concluded with a prayer for an accounting of said trusteeship and of the moneys so received and expended by petitioner in the execution thereof, and that said plaintiff Denney be decreed to pay petitioner, one of the defendants therein, in money the aggregate of the aforesaid sums or thereabouts.

That subsequently to the filing of such answer and cross-bill by this petitioner to such original complaint, and subsequently to default therein by said defendant Boyer, the plaintiff therein, Timothy P. Denney, through his counsel, moved the said District Court for leave to dismiss the said suit, to which this petitioner objected, and said Court declined to permit the plaintiff therein to take a non-suit and dismiss his said suit whereupon he, Denney, filed a motion to strike out portions of this petitioners said answer. Which motion was in part sustained by the Court, whereupon this petitioner, as defendant therein; moved the said Court for leave to file an amended answer to such *original* complaint, pending which motion the said plaintiff, Timothy P. Denney, asked and obtained leave of the

Court to file, and did file, an *amended complaint* therein, of the nature and to the effect as hereinbefore stated.

That the petitioner, as one of the defendants therein, objected at the time to the filing of such amended complaint, on the ground that it was not an amendment proper, but on the contrary that it set out an entirely new and wholly different cause of suit, and that plaintiff was thus seeking to do, by indirection, that which the law and the Court, by its decision just rendered, would not permit him to do directly by dismissing his suit for the purpose of commencing anew; this objection of petitioner the said District Court overruled and plaintiff, Denney, was permitted to file said amended complaint, to which ruling this petitioner, as one of the defendants therein, at the time excepted, which exception was allowed by the Court.

Thereupon this petitioner moved to strike out divers portions of said *amended* complaint, which motion was overruled by the Court, to which this petitioner, as defendant therein, duly excepted and the exception was allowed by the Court, and all of which exceptions appear of record in said cause.

Whereupon this petitioner asked leave of the Court to file an answer to said amended complaint, which motion was granted conditionally upon the payment of $100.00, and this petitioner did pay said $100.00 into Court as required, and did file an answer to said amended complaint, which answer was in all respects similar to the answer filed to the *original* complaint, concluding with a prayer similar in all respects to that contained in his answer to the original complaint as hereinbefore specifically stated, and to which plaintiff, Denney, filed a reply.

The issues being thus joined the cause was referred to B. L. Sharpstein, referee, for the purpose of taking the testimony and reporting his findings of fact and conclusions of law to the Court. The said order of the Court making such reference was, as appears from said record in words and figures, as follows:

"NINTH JUDICIAL DAY.—WEDNESDAY, NOV. 27, 1878.

TIMOTHY P. DENNEY, *Plaintiff.*
vs.
HOLLON PARKER AND JOHN F. BOYER, *Defendants.*
} Order of Reference.

This cause coming up on this 27th day of November, 1878, plaintiff, by his said attorneys, moves that the same be referred to a referee to take an account and all the evidence between plaintiff and defendants, touching all and singular the matters in controversy between them in this suit and report the same to this Court, together with his findings of fact upon the pleadings and said evidence, and defendants having nothing to say why such reference should not be made, it is ordered by the Court that the cause be, and the same is hereby referred to B. L. Sharpstein, Esquire, he, the said B. L. Sharpstein, having been agreed upon, selected and chosen by said parties, plaintiff and defendants, in open Court to take the evidence and a full accounting of said cause and find the facts thereon, and that he report the same to this Court on or before the first day of the next regular term, the parties reserving any and all rights of exception and appeal from said report. And it is further ordered upon the consent of the parties by their respective attorneys duly had and given in open Court, that said referee sit in this cause and take said acconnt and the evidence, and make said findings of fact and report the same in vacation, and that for that purpose he sit, and commence said matters on the first Monday in January, 1879, at the city of Walla Walla, and that he thereafter sit and hear the same upon his own adjournments until the whole shall be completed.

(Signed) S. C. WINGARD, Judge."

Subsequently the said referee after taking a vast amount of testimony, nearly 2,000 pages, submitted his report and findings to the Court. To this report exceptions were filed by both parties, plaintiff Denney and this petitioner, which report and exceptions thereto were argued by counsel and the same taken under advisement by the Court, which on March 15th, 1882, filed in said cause his findings of facts and conclusions of law, to which findings and conclusions of said Court this petitioner filed exceptions, which exceptions being argued and considered, the said cause was again taken under advisement by the Court, and on March 31st, 1882, said Court rendered a decision therein, of which the following is a full and true copy:

DECREE OF COURT.

"In the District Court of the First Judicial District of Washington Territory, in and for Walla Walla County.

TIMOTHY P. DENNEY,
Plaintiff,
vs
HOLLON PARKER AND JOHN F. BOYER,
Defendants.

And now on this 31st day of March, A. D. 1882, came J. K. Kennedy, Wyatt A. George and J. B. Allen, of counsel for said plaintiff, and move the Court and the Judge thereof for judgment and decree herein upon the findings and conclusions filed herein by the Judge of the Court on the 15th day of March, A. D. 1882, and upon the papers, records and proofs in the cause and it fully appearing to the Court and the Judge thereof, by stipulation of parties duly made that judgment and decree may be had and entered in this cause in vacation as fully in all respects and to the like effect as in regular term time, and the Court hav-

ing heard the argument of the respective parties upon the exceptions of said defendant, Parker, to the report and supplemental report of the referee on file herein; and being fully advised in the premises, over-rules each and all of said exceptions and the report and supplemental reports of said referee having been in all things confirmed except as modified and altered by the said findings and conclusions of the Judge of the Court, filed herein March 15th, 1882.

After full argument touching, all matters involved, now by reason of the law and the premises, it is hereby adjudged and decreed that said plaintiff, Timothy P. Denney, do have and recover of and from said defendant, Hollon Parker, the sum of one thousand and seventy-four and 46-100 (1074.46) dollars and the costs of this action taxed at * * * * dollars and that execution issue for the same.

And it is further adjudged and decreed, that the said plaintiff Timothy P. Denney, is in equity, the owner of and entitled to the immediate possession of the following described real estate described in the said reports and findings, to-wit:

The south half of lots 6 and 7 in block L in Walla Walla city and county, Washington Territory, bounded and described as follows: Commencing at the south-west corner of said block and fronting easterly on the north side of Poplar street, a distance of one hundred and twenty feet, thence at right-angles northerly sixty feet, thence at right-angles westerly one hundred and twenty feet, thence at right-angles southerly along the east side First street to the place of beginning, known as the Emerick lots; also, all that lot situated in Walla Walla city and county, Washington Territory, bounded and described as follows:

Beginning at a point one hundred and twenty feet north 60° east of the intersection of south line of Park street, with the east line of Katherine street, thence south 30°, east one hundred and twenty feet, thence at right-angles one hundred and twen-

ty feet; thence at right-angles eighty-eight and eight-twelfth feet to the place of beginning. The same being in what is known as Roberts' claim, lot 7 in block 27, Roberts' addition to the city of Walla Walla, known as the "Little Lot."

And also all of that certain real estate hereinafter described and called the "Springer Property." That said defendant has at all times, in the said reports mentioned, held the legal title thereof, but in trust for said plaintiff. And it is further ordered, adjudged and decreed that the same defendant, Hollon Parker, do and is hereby required to execute good and sufficient deeds and conveyances and within twenty days from the date of this decree, deliver the same to said plaintiff conveying thereby unto said plaintiff, his heirs, executors, administrators and assigns forever, all right, title, claim and interest whatsoever of him, the said Hollon Parker, of, in, and to the said described real estate called the "Emerick Lots," and said described real estate called the "Little Lots," together with all the tenements, hereditaments and appurtenances, to each of said premises belonging or in anywise apportaining, free and clear of all incumbrances, done or suffered by said Parker or by any person claiming by, from, or under him, and also conveying by like deed and conveyance in like time, all right, title and interest of every nature, of said defendant, Hollon Parker, of, in, and to that certain real estate called the "Springer Property," acquired by him, the said Parker, under and by virtue of a certain deed of conveyance bearing date the 18th day of April, A. D. 1874, in which R. J. Springer and Susan M. Springer, his wife, are grantors, and J. K. Straight and said Hollon Parker are grantees and recorded in Book L of Deed Records of said county at page 429 and 430 and described as follows, to wit:

Commencing at a point, on the section line between section nineteen (19) and thirty (30) in township seven (7) north of range thirty-six (36) east of the Willamette meridian, one chain and fifty-nine links (1 59–100 chains) west from the

north-east corner of lot four (4) in said section thirty (30), thence running west on said line seven (7) chains and ninety-eight links (7 98–100) to a stake; thence north six chains and nine links (6 9–100) to a stake; then north eighty-six degrees and forty-five minutes (86° 45'), east six chains and eighty-nine links (6 89–100) to a stake, and thence south eighty degrees and thirty minutes (80° 30'), east six chains and fifty-eight links (6 58–100) to the point of commencement, containing four and 682–1000 acres, more or less, and being a part of the south-west quarter of the south-east quarter of said section nineteen (19).

And if within the time hereby prescribed for the execution and delivery of said deeds and conveyances, said defendant Parker has not executed and delivered each and all of said deeds and conveyances as herein required of him, then that he be and appear before the Judge of this Court at his chambers in Walla Walla, Washington Territory, on the 27th day of April, 1882, at the hour of 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, then and there to show why he has not done so, and if for any cause to the Court, or the Judge thereof, deemed sufficient within the time herein allowed, or such further time as may by the Court or Judge thereof be allowed, the said Parker fails to make, execute and deliver all or any of the said deeds and conveyances herein required of him, it is ordered, considered and decreed that J. E. Budd, of said Walla Walla county being a suitable person thereof, be and hereby is appointed a commissioner to convey all and singular the said real estate and every part and parcel thereof and every interest therein, as fully as required of him the said defendant Parker, unto the said plaintiff Timothy P. Denney, his heirs and assigns forever, in the manner by law in such cases required, at the cost of said defendant Parker.

And it is further adjudged and decreed that the said plaintiff is the equitable owner and entitled to the immediate possession of

the following described parcel of land situated in Walla Walla city and county, in Washington Territory, to wit:

Commencing at a point on a continuation easterly of the south line of Birch street in said city, one hundred and twenty feet easterly from the north-west corner of the lot of land deeded by A. B. Roberts and wife to Snider and Reese on the 30th day of September, A. D. 1868, thence running easterly from said point on a continuation of said south line of Birch street one hundred and twenty feet, thence southerly at right-angles two hundred and forty feet; thence westerly at right-angles one hundred and twenty feet; thence northerly at right-angles two hundred and forty feet to the place of beginning, known as the "Costin Lot," and that the said defendant, John F. Boyer, has and holds the legal title to the said described last parcel of land, in trust however for said plaintiff, which legal title is in fact a mortgage to secure the payment of $393 85–100 and $70 89–100 interest, and it is further adjudged and decreed that the said John F. Boyer upon the payment to him of the said sum, forthwith convey to plaintiff, his heirs and assigns forever, by good and sufficient deed all his right, title, interest and claim, in and to the said last described piece, lot or parcel of land, and if, for any cause, the said John F. Boyer should fail to execute and deliver the said deed of conveyance as herein required of him, then and in that event that J. E. Budd, Esq., of Walla Walla county, Washington Territory, be and he hereby is appointed a commissioner to make, execute and deliver said conveyances at the cost of the said John F. Boyer.

S. C. WINGARD,
Judge.

Filed March 31st, 1882.

A. REEVES AYRES,
Clerk."

To the entry of which decree this petitioner at the time duly excepted, which exception was duly allowed by the Court.

That subsequently, on April 20th, 1882, that being the time fixed by the Court for such purpose, and agreed to by the parties thereto, this petitioner, through his counsel of record, filed a motion in said cause to set aside said decree and findings of the Court and referee and for a new trial, setting out various reasons therefor, which motion was, after argument by respective counsel, over-ruled by said District Court and said judgment and decree permitted to stand; and to which ruling of the Court this petitioner, as defendant therein by his counsel, at the time duly excepted, and the exception was allowed by the Court.

Petitioner further avers that Sections 454, 455, 456 and 457 of the Code of Washington Territory, (1881,) in force now and which have been ever since, prior to the rendition of the decree aforesaid, provide as follows:

"Section 454. A part of several co-parties may appeal or prosecute a writ of error; but in such case they must serve notice thereof upon all the other co-parties and file the proof thereof with the clerk of the Supreme Court.

"Sec. 455. If the other co-parties refuse to join, they cannot, nor can any of them, take an appeal or writ of error afterwards; nor shall they derive any benefit from the appeal, or suit in error unless from the necessity of the case.

"Sec. 456. Unless they appear and decline to join, they shall be deemed to have joined and shall be liable for their due proportion of costs.

"Section 457. An appeal or writ of error from part of an order or from one of the judgments of a final adjudication, or from *part of a judgment*, shall not disturb or delay the rights of any party to any judgment or *part of any judgment*, or order not appealed from, but the same shall proceed as if no such appeal had been made."

Petitioner further avers that on the 19th day of June A. D. 1882, being desirous of taking an appeal from the above designated judgment and decree to the Supreme Court of said Territory, he prepared and caused to be signed by A. E. Isham, his attorney of record, in said cause in said Court, and caused the same to be duly served on his said co-defendant, John F. Boyer, a notice dated June 19th, 1882, and addressed to him the said John F. Boyer, and of which notice the following is a true and full copy:

"In the District Court of the First Judicial District of Washington Territory in and for Walla Walla county.

TIMOTHY P. DENNEY,
Plaintiff.
vs.
HOLLON PARKER AND JOHN F. BOYER,
Defendants.

To John F. Boyer, one of the defendants in the above entitled cause; you will please take notice that your co-defendant, Hollon Parker, in the above entitled action will, on this the 19th day of June, 1882, file a notice of appeal and stay-bond and appeal said cause to the Supreme Court of Washington Territory, holding terms at Olympia, July term, 1883, and you are hereby requested to join in said appeal.

(Signed) A. E. ISHAM,
Attorney for Hollon Parker, Defendant."

Dated this 19th day of June, 1882.

That afterwards, on said 19th day of June, 1882, said John F. Boyer, this petitioner's co-defendant in said suit, endorsed in writing on the original of the above notice so served upon him,

and signed his name to the same, his acceptance of service thereof, and in which writing he declined to join in an appeal in said cause to the Supreme Court. That the following is a full and correct copy of said acceptance of service of said notice and declination to join in such appeal by said co-defendant John F. Boyer:

ACCEPTANCE OF SERVICE AND WAIVER.

"I hereby accept service of the above notice, this 19th day of June, 1882, and decline to join in an appeal in said cause wherein T. P. Denney is plaintiff and Hollon Parker and John F. Boyer are defendants.

JOHN F. BOYER, Defendant."

That this petitioner caused said original notice, so served on the co-defendant, Boyer, together with his said acceptance of service and declination to join in the said appeal indorsed thereon, as hereinbefore stated, to be duly filed in said cause on July 9th, 1883, in the Supreme Court of Washington Territory, and with the clerk thereof, which filing in said Supreme Court was done on or before the first day of the next term of said Supreme Court, commencing after filing of the said notice of appeal in the District Court, and with the transcript of appeal filed therein, but at *that* time petitioner made no other or further proof, except as above, of the service of such notice of appeal on his co-defendant, Boyer.

That Sections 458, 459 and 460 of the Code of Washington Territory, relating to the manner of taking and perfecting an appeal to the Supreme Court of said Territory, and which were in force at the time such appeal was taken, are as follows:

"Section 458. An appeal or writ of error is taken by filing with the Clerk of the Court in which the judgment or order appealed from is entered a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney. Every notice of appeal or

writ of error must be signed by the party taking the same, or his attorney of record, and must contain the title of the District Court in which the proceedings sought to be reviewed were had; the title of the cause as in the District Court; a particular description of the judgment, decree, or order sought to be reviewed; and in case of appeal, a particular description of every decision, ruling, order or decree by which the appellant claims to have been aggrieved, and which he relies upon as ground for a reversal or modification of the judgment, order, or decree; and in case of a writ of error, a particular description of the errors assigned.

"Sec. 459. An appeal shall not be perfected until the notice thereof has been served upon the adverse party, or his attorney of record. Upon payment of his fees the clerk shall forthwith transmit by mail, express, or messenger, not a party, nor the attorney of a party, a transcript of the record in the cause, or so much thereof as the appellant or plaintiff in error, in writing, in the notice has directed, to which shall be appended copies of the notice of appeal; and the supersedeas bond if any.

"Sec. 460. The notice of appeal or suit in error, must be served at least thirty days, and the cause filed and docketed at least fifteen days before the first day of the next term of the Supreme Court; or the same shall not then be tried unless by consent of parties, if the appeal or writ of error is taken less than thirty days before the term, it must be so filed and docketed, before the next succeeding term."

That on said 19th day of June, 1882, and subsequently to the service of said notice of appeal on co-defendant Boyer aforesaid, this petitioner duly filed in the said cause, and in said District Court, and with the clerk thereof, his notice of appeal therein, duly signed by A. E. Isham, petitioner's attorney of record in said cause, stating the appeal from, and appealing from the said decree and from all the decisions connected therewith, and er-

rors committed therein in all of the proceedings of said District Court in said cause, to the Supreme Court of Washington Territory; that such notice of appeal contained the title of the said District Court in which said decree was rendered, and the title of the cause in said case, as in the District Court; a particular description of the decree and proceedings in said cause sought to be reviewed, including a particular description of every decision, ruling, order, and decree in said cause to which exception was taken as hereinbefore stated, and by which petitioner claimed to have been aggrieved and on which he relied as ground for a reversal of such decree. And on the 24th day of June, 1882, petitioner, as defendant in said suit, caused said notice of appeal to be duly served on John B. Allen, one of the attorneys of record in said cause of the plaintiff therein, Timothy P. Denney, by the delivery to him, personally, of a certified copy thereof in Walla Walla county, Washington Territory.

And also on the same day caused the said notice of appeal to be served on A. Reeves Ayres, clerk of said District Court, in which said decree appealed from was rendered by the delivery to him personally, at his office, in the county of Walla Walla and territory of Washington of a certified copy of such original. The service in each case was made by James B. Thompson, then sheriff of Walla Walla county, Washington Territory, and he as such sheriff made due and lawful return thereof to said District Court on the original notice of appeal which was duly filed with said original notice in said cause in said District Court.

That said notice of appeal, in pursuance of Section 459 of said Code, contained a direction to the clerk of said District Court as follows:

"And you, the clerk of said Court, will please transmit to the Supreme Court all the papers filed in this cause (except subpœnas) as by law provided in Sections 459 and 464, Code of 1881, together with your certificate, as provided under rule number II, of the Supreme Court."

Petitioner further avers that subsequently to the filing of said notice of appeal and on the same day petitioner also filed in said cause in said District Court, to-wit, on the 19th day of June, 1882, a supersedeas bond on appeal as by law required, which bond was duly approved and accepted, and petitioner as defendant therein did in all respects perform every act and thing required of him by the statutes of Washington Territory, to perfect his appeal therein, and did perfect such appeal.

That in pursuance of the requirements of the Code of Washington, and of the directions of this petitioner as appellant as hereinbefore stated, and in accordance with the rule of said Supreme Court as hereinafter set out, the clerk of said District Court transmitted to the clerk of the Supreme Court, with his certificates under his hand and the seal of said Court attached thereto, as by law required, a complete transcript of the record in said cause and in which and to which was appended copies of the said notice of appeal and supersedeas bond as by law directed, together with all the evidence introduced by the parties on the trial in the Court below *in its original form*, as required by Sections 451, 457 and 464 of said Code, including also the original certificate of the said referee in said cause, certifying to the District Court the evidence taken in said cause in said Court, and to which transcript was attached by A. Reeves Ayres, clerk of the said District Court, his two separate certificates each under his hand and the seal of said Court; and copies of each of which said certificates are here given and for the purpose of distinction and designation are marked certificates "A" and "B" and as such shall be designated, called and known hereinafter in this petition; and from which certificates it was made to appear that such transcript contained *all* the evidence introduced by the parties on the trial of said cause in the Court below, as required by Section 451 of said Code.

CERTIFICATE "A."

TERRITORY OF WASHINGTON, }
FIRST JUDICIAL DISTRICT. } ss.

"I, A. Reeves Ayres, Clerk of the District Court of Washington Territory and for the First Judicial District thereof, holding terms at Walla Walla City, Walla Walla County, Washington Territory, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I am by statute on appeal and direction of attorneys in said cause required to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said District Court, this 15th day of June, 1883.

A. REEVES AYRES, Clerk.

By FRANK W. GOODHUE, Deputy."

{SEAL} U. S. District Court, First Judicial District, Walla Walla, Washington Territory.

CERTIFICATE "B."

TERRITORY OF WASHINGTON, }
FIRST JUDICIAL DISTRICT. } ss.

"I, A. Reeves Ayres, Clerk of the District Court of Washington Territory, and for the First Judicial District thereof, holding terms at Walla Walla, Walla Walla County, in said Territory, do hereby certify that the five packages of testimony herewith transmitted to the Supreme Court and numbered by pages, from 1 to 1,572, is all the testimony in the case of Timothy P. Denney vs. Hollon Parker and John F. Boyer as taken before B. L.

Sharpstein, Esquire, referee in said case, and by him deposited with the Clerk of said Court. And I further certify that the letters, papers and exhibits herewith transmitted and numbered in red ink figures, from 1 to 130 respectively, are all the papers, letters and evidence introduced in said cause before said referee and by him deposited with the Clerk of said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court this 15th day of June, 1883.

A. REEVES AYRES, Clerk.

By FRANK W. GOODHUE, Deputy."

{SEAL} U. S. District Court, First Judicial District, Walla Walla, Washington Territory.

That the said certificate of B. L. Sharpstein, referee in said cause in said District Court, the original of which was certified up to the Supreme Court as a part of the transcript by the Clerk of said District Court, was and is, in words and figures as follows:

CERTIFICATE OF REFEREE.

"I, B. L. Sharpstein, referee in the case of Timothy P. Denney vs. H. Parker and J. F. Boyer, do hereby certify that the foregoing evidence, consisting of five packages or bundles, numbered one (1), two (2), three (3), four (4), and five (5), is the evidence written down before me and taken in said action, and that the same with the documentary evidence returned herewith by me into Court constitute the evidence submitted to and taken by me in said action.

Dated March 10th, 1882.

B. L. SHARPSTEIN, Referee."

Petitioner further, for convenience to the Court, avers that Sections 451, 464, 465 and 466 of the Code of Washington provide as follows:

"Section 451. When a cause is tried by the Court it shall not be necessary in order to secure a review of the same in the Supreme Court, that there should have been any finding of facts or conclusions of law stated in the record; but the Supreme Court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties or their attorneys, or in case the evidence consists wholly of written testimony from the certificate of the Clerk that the transcript contains all the evidence introduced by the parties on the trial in the Court below.

"Sec. 464. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the Clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the Supreme Court, and shall be so certified not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unless by direction of the appellant. If so certified when not material to the determination of the appeal or writ of error the Court may direct the person blamable therefor to pay the cost thereof.

"Sec. 465. The appellant or plaintiff in error shall file a perfect transcript; and to that end the Clerk of the Court below must, at any time on his suggestion of the diminution of the record, and on the payment of fees, certify up any omitted part of the record according to the truth, as the same appears of record in

his office, and such appellant shall not be entitled to any continuance in order to correct the record, unless it shall clearly appear to the Court that he is not in fault; subject to which requirement either party may, on motion, before trial day obtain an order on the Clerk below commanding him to transmit at once to the Supreme Court a true copy of such imperfect or omitted part of the record as shall be in general terms described in the affidavit or order. Such motion must be supported by affidavit unless the diminution be apparent or admitted by the adverse party, and must not be granted unless the Court is satisfied that it is not made for delay.

"Sec. 466. An appeal or writ of error shall not be dismissed for any informality or defect in the notice or the service thereof, if from the transcript it can be reasonably understood that the adverse party has had sufficient notice of the pendency of the suit in error or appeal, and the notice recites the errors alleged, or the order or judgment complained of with such certainty that his substantial right would not be prejudiced by the hearing of the cause; and the Supreme Court shall upon reasonable terms allow all amendments in matters of form, curative of such defects to the end that substantial justice be secured to the parties."

That Rule II of the Supreme Court of Washington Territory is as follows, and was an existing rule of said Supreme Court when said appeal was taken:

RULE II.

CLERK'S CERTIFICATE.

"Transcripts must be certified by the Clerk of the District Court in substantially the following form:

TERRITORY OF WASHINGTON, }
. . . . . JUDICIAL DISTRICT. } ss.

I, ... , Clerk of (*title of the Court*) do hereby certify that the foregoing is a full, true and correct transcript of so much of the record in the above entitled cause as I am by statute required on appeal (or writ of error) to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said District Court, this . . . . . day of . . . 18 . .

{SEAL}

. . . . . , Clerk.

By . . . . . Deputy."

Petitioner further avers that said cause was tried *exclusively* in the District Court on *written testimony*, and the depositions and all papers which were used as evidence, including all the evidence introduced by the parties in the Court below (District Court), were duly certified up to said Supreme Court as part of the transcript on said appeal.

Petitioner further avers that the said transcript of said cause so certified up to the Supreme Court, was duly filed in said Supreme Court and with the Clerk thereof, on the 22nd day of June A. D. 1883, and said cause was docketed in said Supreme Court at the July term thereof, 1883, and numbered in said Court as of that term No. 348.

That at the term of the Supreme Court of Washington Territory, to which said appeal was taken, to-wit, the July term thereof, 1883, in which it was docketed as aforesaid, the appellee, Timothy P. Denney, through his attorneys of record in said cause, on July 10th, 1883, filed therein a motion to dismiss said appeal, of which motion the following is a full and correct copy:

"In the Supreme Court of Washington Territory, holding terms at Olympia.

JULY TERM, 1883.

HOLLON PARKER,
Appellant,
vs
TIMOTHY P. DENNEY,
Appellee.

"Comes now the above named appellee, Timothy P. Denney, and appearing solely and exclusively for the purpose of this motion, moves the Court to dismiss the appeal herein, for the following reasons:

"1st. Because the purported notice of appeal herein does not contain the title of the Court as in the District Court.

"2d. Because said purported notice of appeal does not contain a particular description of the judgement, order or decree sought to be reviewed, or any of them.

"3rd. Because said purported notice of appeal does not contain a particular description of every or any decision, ruling, order or decree, by which said appellant claims to have been aggrieved or which he relies upon as ground for a reversal or modification of any judgment, order or decree in the District Court.

"4th. Because said purported notice of appeal does not contain a particular description of the errors assigned or any of them.

JOHN B. ALLEN,

Attorney for said appellee, Timothy P. Denney, for the purpose of said motion."

Which motion on July 11th, 1883, said Supreme Court after argument overruled, but held that the said notice of appeal was faulty in being too prolix, and suggested an amendment thereto as provided in Section 466, *Supra* of said Code of Washington, and in deciding said motion, said Supreme Court filed an opinion in said cause, of which the following is a full and correct copy:

HOLLON PARKER, et al.,
Appellants,
— VS
TIMOTHY P. DENNEY,
Appellee.

OPINION.

"We are agreed that the formal defects of this motion of appeal in regard to the title of the Court and the title of the cause, and the particular description of the judgment appealed from, are not such as would warrant a dismissal of the appeal. It is not every non-compliance with the provisions of § 458 that will fall outside the saving provisions of § 464.

"What the Court is, from which the appeal is taken, and what the cause and judgment are, which are brought here, sufficiently appear from the notice. In these particulars there is a substantial compliance with the statute.

"But this notice has faults not so easily overlooked. Two sorts of notices are prescribed by § 458.

"One is for cases in error, the other for cases upon appeal.

"These two, though intended to be similar in structure, do not necessarily assume the same form.

"The one must contain a particular description of the errors assigned, the other a particular description of each ruling or or-

der whereby the appellant claims to have been aggrieved; or in other words, one must have in it a specific assignment of errors, the other a specific list of injurious rulings, orders or decisions.

"A like purpose is intended to be accomplished both by the list and by the assignment. It is to narrow, the range of controversy to its *minimum*, to define it, and to apprise the adverse party, and the appellate Court of its extent. But the nature of the device for affecting this purpose is different from the one from what it is in the other. Under the old common law practice, an assignment of errors, was a pleading, the allegations whereof were to be proved by the production of the record from the lower Court, and its nature is still the same when incorporated in the notice required by our statutory practice. But the list of obnoxious rulings required to be in the notice under our statute in an appeal case, is not in the nature of a pleading, but of an election. Notwithstanding this distinction, however, there is no reason why the same rules for brevity and simplicity of statement should not apply as well to the list, as to the assignment. They have been assimilated by the legislature on purpose to simplify and unify the procedure for getting common law and chancery cases into this court for review.

"It is possible to choose a form of words which will serve equally well for the one as for the other. All the statute requires on appeal is a particular description of every ruling, order, decree or decision whereof appellant has been aggrieved. What more is it necessary for him to say then, than that he has been aggrieved by the orders, rulings, and decisions following, and there enumerate them severally, by descriptions, sufficient to identify each?

"But in the notice before us the particular description of orders objected to is a bewildering mass of involved statements, repetitions and surplussage. Sixteen or eighteen pages are filled with a stretching and stuffing of what might be amply stated in a couple of pages. All that was done by the referee was covered by the Judge in passing upon the referee's report. A designa-

tion of that single order, as one by which appellant has been aggrieved, would have been enough to bring before this Court the entire doings of the referee.

"We feel compelled to strike from this notice therefore all in it relating to interlocutory matter. This will not necessitate a dismissal of the appeal, although it may render an amendment of the notice desirable.

"We wish to say further in regard to this notice that it is altogether too prolix from beginning to end.

"Among other peculiarities we remark it embodies matter showing that a bill of exceptions was made in the lower court, and includes much that constitutes that bill.

"A bill of exceptions has no place nor function in a chancery cause. Besides encumbering the records, it greatly enhances cost.

"Motion denied and it is ordered that all matter in the transcript from the 3rd line of page 286 to the 16th line on page 307, inclusive, be stricken out.

"Dated 11th July, 1883.

ROGER S. GREENE,
Chief Justice.

"We concur.

S. C. WINGARD,
Associate Justice,

JOHN P. HOYT,
Associate Justice."

That in pursuance of the suggestions contained in the opinion above quoted, this petitioner, as appellant, by his attorney of record, A. E. Isham, on July 13th, 1883, filed a motion in said cause in said Supreme Court for leave to file an amended notice of appeal in said cause, which motion was duly served on the counsel of appellee and was conditionally allowed by the Court, and leave was granted to file such amended notice, upon payment by this petitioner into the Court as a condition precedent

thereto of the sum of one hundred dollars ($100) in cash; and in pursuance thereof this petitioner, through his attorneys of record, A. E. Isham and W. G. Langford, paid into Court in said cause, and to the Clerk thereof, the said sum of one hundred dollars ($100) in cash, on said 13th day of July, 1883, and on said date filed an amended notice of appeal in said cause conforming to the rulings and suggestions of said Court contained in its opinion above quoted, which amended notice of appeal was in words and figures as follows:

AMENDED NOTICE OF APPEAL.

"In the District Court of the First Judicial District of Washington Territory, in and for Walla Walla county:

TIMOTHY P. DENNEY, *Plaintiff*, vs. HOLLON PARKER AND JOHN F. BOYER, *Defendants*.	Amended notice of appeal by leave of the Supreme Court, W. T., July term, 1883.

"To Timothy P. Denney above named plaintiff, and James K. Kennedy, W. A. George, John B. Allen and T. J. Andrews, attorneys for plaintiff, and A. Reeves Ayres, Clerk of said Court:

"Please take notice that the defendant, Hollon Parker, in the above entitled action, hereby appeals to the Supreme Court of Washington Territory, holding terms at Olympia, at the July term A. D. 1883, from the decree and judgment therein made and entered in the District Court of the First Judicial District of Washington Territory, in and for Walla Walla county, in favor of plaintiff, Timothy P. Denney, in said action and against the defendants, Hollon Parker and John F. Boyer, and from the

whole thereof said decree and judgment rendered on the 31st day of March, A. D. 1882, against defendants, Hollon Parker and John F. Boyer, as follows, to wit:

(See decree printed herein before, pages 8–12.)

The said defendant has been aggrieved by the orders, rulings, decree and judgment following:

1st. In granting plaintiffs motion on the 31st of March A. D. 1882, for judgment and decree against the defendants and in favor of the plaintiffs, and in rendering the aforesaid judgment and decree herein before set out in said motion on the 31st of March A. D. 1882.

2nd. In overruling defendant Parker's motion and exceptions filed Feb. 24, 1882, to vacate and set aside the reports and supplemental reports of the referee, B. L. Sharpstein; said order made said in judgment and decree rendered and dated March 31st, 1882, above set out; said report is dated July 25, 1881, and endorsed report of referee, filed July 27th, 1881, A. Reeves Ayres, Clerk, and said supplemental report is docketed Feb. 8th, 1882. A. Reeves Ayres, clerk.

3rd. In allowing plaintiff to withdraw his motion made Feb. 15th, 1882, to confirm the reports of the referee and then allowing plaintiff to make and file his motion dated March 9th, 1883, to confirm the reports of the referee; all but the 4th item thereof and in sustaining said motion as per judgment and decree heretofore set out, dated March 31st, 1882.

4th. In overruling defendant, Parker's, motion for a new trial in said cause, filed April 20th, 1882, and said order made on said motion April 25, 1882.

5th. In making an order on the 31st day of March, 1882, requiring defendant, Hollon Parker, to execute a deed to the

property described in the decree and known as the "Emerick Lot," "Little Lot," and the "R. J. Stringer Lot" or be in contempt of Court.

6th. In overruling defendant, Parker's, general demurrer, filed on the 23d day of June, 1877, said ruling made on December 20, 1877.

7th. In allowing plaintiff's motion, to file an amended complaint on May 15th, 1878, and in allowing any amended complaint to be filed in said cause at said time, which said complaint is the one upon which the cause was tried and is the only amended complaint.

8th. In overruling defendant's motion to strike out parts and make more definite and certain plaintiffs' amended complaint, said motion filed June 29th, 1878, said ruling made on the 20th of November 1878, and in ruling on said day that the defendant Parker be required to pay $100.00 as terms for the privilege of filing an answer to the amended complaint of plaintiff.

9th. By the Court and the referee admitting any evidence of the mental or physical condition of plaintiff, T. P. Denney, and in ruling upon impeachment questions (rejecting the same) put to D. M. Jessee, Leroy Brown, C. H. Mack, H. Parker, A. E. Isham, L. B. Parker, Henry Martin, E. J. Martin and T. P. Denney, said questions asked for the purpose of impeaching the plaintiff, and in rejecting the evidence in regard to the Cantrell property, going to show who was entitled to the rents, issues and profits thereof, the plaintiff or defendant, Parker, and in refusing to admit the letter in evidence, written by T. P. Denney to H. Parker, dated July 28, 1874.

10th. In overruling defendant Parker's motion to retax costs filed April 20, 1882, said motion is to disallow plaintiffs costs for all evidence taken before the referee which was objected to by

defendant and the objection sustained when said evidence was frivolous and inadmissible.

11th. In ordering defendant Parker to execute a deed of the real property described in the decree, or be and remain in contempt of Court until said deed was executed, said order made on the 31st day of March, 1882.

And you, the clerk of said Court, will please transmit to the Supreme Court all the papers filed in this case (except subpœnas) as by law provided in Sections 459 and 464 Code of 1881, together with your certificate as provided in Rule No. 3 of the Supreme Court.

A. E. ISHAM & W. G. LANGFORD,

Attorneys for H. Parker.

Petitioner avers that Rule 3 of the *old* rules of said Supreme Court and Rule II of new and existing rules are precisely alike.

That subsequently, as will be hereinafter specifically stated, the appellee, Timothy P. Denney, by his counsel, appeared *generally* in said cause in said Snpreme Court, and filed a motion therein to strike from the files a demurrer to the amended complaint, and to affirm the judgment and decree in the Court below, which motion was sustained by striking out such demurrer, and overruled as to the prayer for affirmance of judgment and decree; and after the filing of divers other motions therein, the said cause came on for trial on its merits in said Supreme Court in the July term thereof, 1883; this petitioner, as appellant therein appearing by A. E. Isham as his attorney, and the appellee, Timothy P. Denney, appearing by his attorneys, John B. Allen and James K. Kennedy.

That said trial commenced on the 23rd day of July, 1883, and was continued from day to day in a hearing on the merits upon the transcript of the record of said District Court, until the 27th day of said month of July, when the argument therein was con-

cluded, and the cause was taken under advisement by the said Supreme Court, and was not decided when said term of said Supreme Court expired.

That subsequently and before a decision was handed down in said cause by said Supreme Court, a new and additional Judicial District was created by Congress in Washington Territory, and a new and additional Judge of said Supreme Court was appointed and confirmed, thus increasing the number of Judges of said Supreme Court from three to four, and thus destroying a quorum of said Supreme Court necessary to a decision of said cause, as Judge Wingard, one of the three Judges that constituted said Supreme Court when said cause was tried, had tried the cause in the District Court and could not rightfully, and did not sit on the hearing of the cause in the Supreme Court; whereupon it was ordered by said Supreme Court, at the July term thereof, 1884—said cause not then being reached for want of time—that said cause should be set down for re-argument, and it was so set down for re-argument, at the July term, 1885, of said Supreme Court. And on the first day of said July term, 1885, said cause was, by order of said Court, set down for re-argument at the foot of the docket of said Supreme Court of cases from the First and Fourth Judicial Districts.

Petitioner further avers that on July 22nd, 1885, in the forenoon of said day, and while said Supreme Court was in session, and before said cause had been reached for trial, and before any motion had been made in said cause at said term, on the part of the appellee, Timothy P. Denney, this petitioner as appellant therein, through his counsel of record, A. E. Isham, moved the said Supreme Court for leave to file in said Court and cause *additional proof of service* of notice of appeal on his co-defendant, John F. Boyer, as hereinbefore set out; which leave was on said 22nd day of July, 1885, granted by said Supreme Court and on the same date and before said cause was reached for trial, petitioner, as appellant therein, duly filed the affidavit of A. E.

Isham, his attorney of record therein, showing conclusively the service of such notice on said co-defendant, John F. Boyer, on June 19th, 1883, and of which affidavit the following is a full and correct copy:

"In the Supreme Court of Washington Territory:

JULY TERM, 1885.

TIMOTHY P. DENNEY,
Appellee.
vs
HOLLON PARKER AND JOHN F. BOYER,
Appellants.

TERRITORY OF WASHINGTON,
THURSTON COUNTY. } ss.

I, A. E. Isham, being first duly sworn depose and say I am the attorney for Hollon Parker, the above named appellant and have been such attorney of record all the time since such action was commenced. That on the 19th day of June, 1882, at the city of Walla Walla, in Walla Walla county, in Washington Territory, between the hours of 9 a. m. and 3 p. m. of said day I served on the defendant above named, John F. Boyer, a written notice, by then and there giving to him a full and true copy of the same, notifying him that his co-defendant, Hollon Parker, would appeal said cause to the Supreme Court of this Territory. The original said notice is dated June 19th, 1882, and filed in this Court July 9th, 1883, marked Ex. "A" and herewith made a part of his affidavit. That said notice was served on said John F. Boyer before the notice of appeal was filed or served in said

Court on the plaintiff or his attorney of record, and that after serving said notice on said John F. Boyer on said day, I filed the notice of appeal which appears of record in this cause; that the party, John F. Boyer, who accepted service on said original notice of appeal filed as aforesaid, and who declined to join with his co-defendant, Hollon Parker, is the same person who signed his name to the said notice of appeal and who is the co-defendant in the above entitled cause.

A. E. ISHAM.

Subscribed and sworn to before me this July 22, 1885.

R. G. O'BRIEN, Clerk."

Petitioner further avers that on Juy 22d, 1885, in the afternoon of said day said cause was reached in said Supreme Court in its regular order for trial on its merits and called for trial by the Court, and A. E. Isham as counsel for petitioner and appellant therein was proceeding in opening the cause to said Court on its merits, whereupon the appellee therein, Elisabeth Denney, executrix of the estate of Timothy P. Denney, by her counsel of record, John B. Allen and D. J. Crowley, the former of whom, Mr. Allen, had argued said cause on its merits in said Supreme Court at the July term thereof, 1883, as hereinbefore stated, asked and obtained leave of the Court to file a *second* motion to dismiss the appeal in said cause; said Court suspending argument in said cause long enough to enable counsel to prepare said motion, which, when prepared, was immediately filed in said Court and by its leave, and the following is a full and correct copy of such motion:

"In the Supreme Court of Washington Territory:

ELISABETH DENNEY, executrix of the estate of T. P. DENNEY, deceased,
Appellee.

vs.

HOLLON PARKER and J. F. BOYER,
Appellants.

Comes now the appellee above named and moves the Court to dismiss the above appeal for the reason that all the co-parties have not joined in said appeal and have not been served with any notice of appeal;

2d. Because no evidence is here properly certified.

JOHN B. ALLEN and D. J. CROWLEY,
Attorneys for Appellee."

After a brief argument and on the same day, and immediately after the filing and argument thereof, the said Supreme Court took the same under advisement, and on the following morning, to-wit, on July 23d, 1885, sustained said motion and dismissed said appeal and filed in said cause an opinion of which the following is a full and correct copy, and to which ruling this petitioner by his counsel then and there excepted, which exception was allowed by the Court:

COPY OF OPINION OF SUPREME COURT DISMISSING APPEAL.

"TERRITORY OF WASHINGTON.—SS.

In the Supreme Court of July term, 1885.

APPEAL FROM FIRST DISTRICT.

HOLLON PARKER AND JOHN F. BOYER,
Appellants,
vs.
TIMOTHY P. DENNEY,
Appellee.

OPINION.

This is a motion to dismiss the appeal.

The cause was brought here under the appellatory provisions of the Code by the appellant, Hollon Parker.

Two grounds for dismissal are urged:

1st. That no notice of appeal, as required by §454 of the Code, was ever served on John F. Boyer;

2d. That there is nothing in the transcript to certify this Court that it has before it the whole of the evidence.

Both points we deem well taken. It was necessary and jurisdictional, for instituting this appeal, to make Boyer a party of it (Code §§ 454, 455, 458, 7 Peters, 399.)

But he only could be made a party by a voluntary joinder or appearance, or in the compulsory mode provided by statute, he has not appeared. A notice of intention to appeal was served on him, but no notice of the appeal actually prosecuted was ever given. He is not in Court.

As to the other point, this Court following the case of *Coleman* vs. *Yesler* has several times decided that the whole of the evidence should be certified in an appeal case. This Court must have the cause in its entirety before it in order to proceed.

Section 451 of the Code prescribes the form of certificate and no certificate but the statutory will avail.

We cannot get jurisdiction by stipulation, or estoppel, or waiver. No statutory certificate is here. The motion is *granted*.

ROGER S. GREENE,
Chief Justice.

We concur.

JOHN P. HOYT,
Associate Justice.

GEORGE TURNER,
Associate Justice."

And July 24th, 1885, said Supreme Court entered judgment in said cause dismissing said appeal, and for costs against petitioner as appellant therein, and of which judgment entry the following is a full and true copy:

HOLLON PARKER AND JOHN F. BOYER,
Appellants.

vs.

ELIZABETH DENNEY,
Executrix of the last will and testament of Timothy P. Denney, deceased,
Appellee.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the District Court of the First Judicial District of Washington Territory, holding terms at Walla Walla, the motion to dismiss, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now on this 24th day of July, A. D. 1885, on motion of John B. Allen, Esquire, of counsel for appellee, considered adjudged and decreed that the appeal from the judgment of the said District Court be and the same is hereby dismissed with costs, and that the said Elizabeth Denney as executrix of the last will and testament of T. P. Denney recover of and from the said Hollon Parker, appellant, the costs of this action, taxed and allowed at * * dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said District Court, to which ruling of the Court appellant by his counsel excepts, and said exception is allowed.

July 24th, 1885.

Petitioner further states that Rule XI of the then existing Rules of the said Supreme Court reads as follows:

XI.

"TECHNICAL OBJECTIONS TO HEARING ON MERITS."

"Exceptions or objections to transcript, bond, notices of appeal, or writ of error, or the service thereof, or to writs of error, or the return thereof and all technical exceptions or objections to record tending to prevent the hearing of a cause upon merits must be taken and plainly stated in the printed briefs of appellees or defendants in error, or the same will not be regarded; and when so taken and specified appellants and plaintiffs in error must present and file on or before the second day of the term such additional or amended record, certificate, or other matter if such there be, as shall be required to remove or answer the exception or objection so taken, unless further time be granted by the Court for cause shown."

Petitioner further avers that the appellees' printed brief on the merits had been filed in said cause in said Supreme Court prior to the commencement of the July term thereof for the year 1883, and no exceptions or objections whatever had been taken or stated in such printed brief, or in any printed brief whatever at any time filed in said cause, or to the transcript or bond or notice of appeal or to the service thereof. That Rule XVII of said Supreme Court provides as follows:

XVII.

"SPECIAL APPEARANCES."

"Any party to a cause pending in the Supreme Court who shall, in person or by attorney, file a brief *or any paper* or shall receipt for papers filed in the cause, *without at the same time affirmatively by written notice to the opposite party or the Court, make a limited or special appearance in the cause*, shall be held to have entered a general appearance in the Supreme Court and to have *waived all objections to the jurisdictional process.*"

That subsequently to the decision of said Supreme Court on July 11th, 1883, at the July term thereof overruling the motion of appellee's attorneys, John B. Allen and J. K. Kennedy, to dismiss said appeal as hereinbefore stated, and after appellant Parker had filed his amended notice of appeal as hereinbefore averred, said Timothy P. Denney, by his said counsel, Allen and Kennedy, appeared *generally* in said cause in said Supreme Court without any reservation, or notice in writing or otherwise to the appellant or the Court that said appearance was limited or special, and filed a written motion therein, to-wit, on July 13th, 1883, to strike demurrer from the files, and to affirm the decree of the Supreme Court, and of which motion the following is a full and correct copy with the file mark thereon:

"MOTION FOR AFFIRMANCE AND DECREE."

"In the Supreme Court of Washington Territory, holding terms at Olympia. July term, 1883.

HOLLON PARKER AND JOHN F. BOYER,
Appellants,
vs.
TIMOTHY P. DENNEY,
Appellee.

"Comes now the above named appellee and moves the Court to strike from the files the demurrer of appellant, Hollon Parker, filed in this Court and cause, the 9th day of July, 1883, because the same is a pleading not authorized by law and not entitled to be filed in this Court, and also moves the Court to affirm the judgment and decree of the lower Court because the notice of appeal of said appellant Parker does not contain a particular

description of any decision, ruling, order or decree by which said appellant Parker claims to have been aggrieved, or which he relies upon as ground for a reversal, or modification of the decree appealed from.

JOHN B. ALLEN,

Attorney for said Appellee."

That the above motion in so far as it sought to strike the demurrer from the files was granted, but the prayer for an affirmance of the judgment and decree of the District Court was overruled.

Petitioner further avers that Section 483 of the Code of Washing Territory provides as follows:

"Section 483. The petition for re-hearing of the applicant shall be the argument therefor, and if the Court thinks that such argument requires a reply, it shall so indicate to the other party and he may make reply within such time as said Court will allow and with a view to a re-hearing the Court may extend the suspension of proceeding yet farther if need be."

And further that Rule XIV of the rules of the Supreme Court of said territory is as follows:

XIV.

"FILING PETITIONS FOR RE-HEARING."

"Every petition for a re-hearing must be filed before the close of the term at which the decision is made; and no more than one petition for a re-hearing of the same question shall be filed; provided that the Court may in its direction allow any petition to be amended."

That in pursuance of said statute and rule of Court this petitioner, as appellant in said cause, did on the 31st day of July, 1885, and before the close of the term at which said decision was made dismissing said appeal, file in said cause in said Supreme Court a petition for the re-hearing of the said motion to dismiss appeal, and for a re-instatement of said appeal, and which petition in all respects conformed to the said statute and rule of said Court, and among other things assigned in said petition as error in the rulings of said Court, and as grounds upon which a re-hearing was demanded, were the following:

"First. The Court erred in holding that no sufficient notice of appeal was served by the appellant, Parker, on his co-defendant, John F. Boyer, as required by section 454 of the Code.

"Second. The Court erred in holding that John F. Boyer, co-defendant of appellant, Parker, was a necessary party to the record on appeal and should have been in Court; and

"Third. The Court erred in holding that there is nothing in the transcript to certify the Court that it had before it the whole of the evidence in this case." That a copy of such petition for re-hearing was duly served by petitioner on J. B. Allen, one of appellee's attorneys of record in said cause at Walla Walla city and county, Washington Territory, on August 2, 1885, and due proof of such service was filed in said cause in said Supreme Court, August 4, 1885. That subsequently said Supreme Court declined to hear argument on said petition for a re-hearing, and on the 4th day of August, 1885, overruled the same and declined to grant a re-hearing, and said Supreme Court subsequently, and without further opinion or action therein, adjourned for the term, and said appeal remains dismissed as aforesaid, with a judgment against your petitioner for costs and disbursements.

Your petitioner further states that subsequent to the July term, 1883, of said Supreme Court and between said term and the

July term, 1884, thereof the appellee in said cause, Timothy P. Denney, died and his widow, Elizabeth Denney, having been duly appointed his executrix, it was ordered by the said Supreme Court, at the July term thereof, 1884, that said Elizabeth Denney as executrix be substituted as said appellee therein, but such order was not entered of record until July 24, 1885, when it was by the order of said Court entered *nunc protunc*, to take effect on and from September 25, 1884.

Your petitioner further avers that on the 21st day of August, 1885, he caused to be served on John F. Boyer, as defendant in said cause in said District Court, by delivering to him personally a copy thereof, in the city of Walla Walla, county of Walla Walla, territory of Washington, a notice duly signed by petitioner's attorneys, requesting him, the said Boyer, to join with the petitioner herein in this application, and at the same time presenting to him for his signature the original petition herein, and of which notice the following is a full and correct copy:

"In the Supreme Court of Washington Territory.

JULY TERM, A. D. 1885.

ELIZABETH DENNEY, executrix of the estate of T. P. Denney, deceased,

Plaintiff and Appellee.

vs.

HOLLON PARKER AND JOHN F. BOYER,

Defendants and Appellants.

To John F. Boyer, one of the defendants in the above entitled cause, you will please take notice that your co-defendant, Hollon Parker, in the above entitled cause will apply to the Supreme Court of the United States at its next term, beginning on the

second Monday of October, 1885, for a writ of mandamus on the Supreme Court of Washington Territory, to reverse the judgment of dismissal rendered ~~in said cause by them~~ in said cause on the 24th day of July A. D. 1885, and to reinstate the appeal in said cause and compel said Court to hear the case on its merits and for such other or further relief as may be just in the premises, and you are herewith requested to join in said application for a writ of mandamus, a copy of which is herewith served and the original petition presented for your signature.

Dated this 21st day of August 1885.

JOHN H. MITCHELL AND A. E. ISHAM,
Attorneys for Hollon Parker."

"AFFIDAVIT OF SERVICE.

Territory of Washington, }
Walla Walla County. } ss.

I, A. E. Isham, being first duly sworn depose and say I am one of the attorneys for the defendant, Hollon Parker, in the above entitled cause. That I served the above notice on John F. Boyer, one of the defendants in said cause, on the 21st day of August A. D. 1885, at 12 o'clock noon of said day in the city and county of Walla Walla, Washington Territory. That the said John F. Boyer is the same person who signed his name above, accepting service of said notice, and is the identical John F. Boyer who is one of the defendants in said cause.

A. E. ISHAM.

Subscribed and sworn to before me this 21st day of August 1885.

{SEAL}

JOHN A. TAYLOR,
Notary Public."

That said John F. Boyer, on said 21st day of August 1885, indorsed on said notice in writing his acceptance of service thereof and his declination to join in this petition and signed the same, a copy of which acceptance of service and declination and also a copy of affidavit of service of said notice on said Boyer are as follows:

ACCEPTANCE OF SERVICE.

"I hereby accept service of the above notice this 21st day of August, 1885, and decline to join in an application for a writ of mandamus in said cause, or any proceedings whatever in said cause wherein Elizabeth Denney, executor of the estate of T. P. Denney, is plaintiff and Hollon Parker and John F. Boyer are defendants.

JOHN F. BOYER,
Defendant."

That said original notice and acceptance of service were subsequently filed by this petitioner in said cause in said Supreme Court of Washington Territory.

Petitioner further avers that said John F. Boyer, as co-defendant, notwithstanding such notice in said cause, declines to join in this petition. And your petitioner further states that he is entirely without remedy in the premises, unless it is conferred by the interposition of this Honorable Court.

That there is, as this petitioner is advised by his counsel, and as he verily believes, substantial error in the proceedings of said cause, and in the decree therein in the District Court, and also in the decision of said Supreme Court dismissing said appeal, whereby the substantial rights of this petitioner, as defendant therein, were, and are, materially and adversely affected; and if said decree is permitted to become final as against this petitioner

and as appellant and defendant therein, an irreparable injury and injustice will be done him.

That the appeal in said cause by this petitioner as defendant therein was not taken for delay but for the purpose of having corrected what he is advised by his counsel, and verily believes are substantial errors in the proceedings in said cause, in said District Court, whereby his substantial rights have been affected and to the end that justice may be done him; nor is this application for either anoyance or delay, but that petitioner's rights may be protected, errors in said cause by said Supreme and District Courts corrected, and justice done him in the premises. That the amount in controversy in said cause is largely in excess of $5,000, exclusive of costs.

Wherefore petitioner prays that a peremptory writ of mandamus may issue herein, directed to the said Supreme Court of Washington Territory, and to the Honorables, the Judges thereof, Roger S. Greene, Chief Justice, and G. C. Wingard, John P. Hoyt and George Turner, Associate Justices, commanding and enjoining them to set aside the order and judgment of said Supreme Court made and entered in the said cause July 24th, 1885, as aforesaid, dismissing said appeal, and rendering judgment against this petitioner as appellant therein for costs; and to reinstate said appeal in said Supreme Court and hear and decide said cause on its merits, and for such other and further relief as petitioner may be entitled to by virtue of the premises, and for his reasonable costs and disbursements herein, and as in duty bound your petitioner will ever pray.

[redacted]

JOHN H. MITCHELL,

Counsel for Petitioner.

W. W. Upton,
also of Counsel
for Petitioner.

WASHINGTON TERRITORY,
County of Walla Walla. } ss.

"I, Hollon Parker, being first duly sworn, do depose and say that I am the petitioner in the above entitled application, that I have heard the said petition read, and the same is true as I verily believe."

HOLLON PARKER.

Subscribed and sworn to before me this 8th day of September, A. D., 1885.

{SEAL}

A. REEVES AYRES,
Clerk District Court.

by B. W. Goodlove
Deputy Clerk

120-107

IN THE

SUPREME COURT,

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

NO._____ORIGINAL.

Ex-parte in the matter of the petition of
HOLLON PARKER,
for a Writ of Mandamus.

The Supreme Court of the Territory of Washington:

The Honorable ROGER S. GREENE, Chief Justice, and the Honorables S. C. WINGARD, JOHN P. HOYT and GEORGE TURNER, Associate Justices thereof,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

Now comes the petitioner, Hollon Parker, by his counsel, John H. Mitchell, and moves this Honorable Court for leave to

file the accompanying petition for writ of mandamus, directed to the Supreme Court of the Territory of Washington, and for the reasons stated in such petition.

JOHN H. MITCHELL,
Counsel for Petitioner.

W. W. Upton,
also of Counsel
for Petitioner.

120-737

In the Supreme Court of the United States,

OCTOBER TERM, 1885.—No. 5.—Original.

Petition of Hollon Parker, for a Writ of Mandamus,

v.

The Supreme Court of the Territory of Washington, the Honorable Roger S. Greene, Chief-Justice, and the Honorables S. C. Wingard, John P. Hoyt, and George Turner, Associate Justices thereof, Respondents.

Now comes the petitioner in the above-entitled cause, by his attorneys, and pursuant to leave first had and obtained by the order of this Court, entered on October 26th, 1885, presents herewith his petition for a writ of mandamus to be issued out of this honorable Court in the manner therein prayed, together with a brief in support thereof, as by said order required.

A. T. BRITTON,
A. B. BROWNE,
W. W. UPTON,
Att'ys for Petitioner.

J. H. MITCHELL,
of Counsel for Petitioner.

1 In the Supreme Court of the United States. October term, 1886.
No. 3. Original.

EX PARTE IN THE MATTER OF THE PETITION of Hollon Parker for a writ of mandamus
vs.
THE SUPREME COURT OF THE TERRITORY OF Washington, the honorable Roger S. Greene, chief justice, and the honorables S. C. Wingard, John P. Hoyt, and George Turner, associate justices thereof, respondents.

Return to rule to show cause.

To the honorable the Supreme Court of the United States:

Roger S. Greene, chief justice, and John P. Hoyt and George Turner, associate justices of the supreme court of Washington, on their own
2 behalf and on behalf of their said supreme court, in obedience to the requirement of the writ of mandamus, issued out of the honorable the Supreme Court of the United States in said matter, requiring said supreme court of Washington Territory and these respondents, and the honorable S. C. Wingard, who, at the time of the issuance of said writ, was, but has ceased to be, an associate justice of the supreme court of Washington Territory, to vacate and set aside that certain judgment in said matter described, and proceed to hear and determine upon the merits the cause wherein said judgment was rendered, do hereby respectfully make the following return and answer to said writ:

That we, the said Roger S. Greene, chief justice, and John P. Hoyt and George Turner constituted the justices of the supreme court of Washington Territory, in the rendition of the judgment in said writ enjoined to be vacated and set aside, the said associate justice, S. C. Wingard not participating therein for the reason that, having determined said cause in the trial court, he was by law precluded from sitting in the hearing of said cause on appeal.

That by the acts of Congress creating the supreme court of Washington Territory, it is only vested with appellate power and jurisdic-
3 tion, and is only authorized and enabled to exercise such jurisdiction in writs of error and on appeal in the manner prescribed by law.

That in the said cause in said writ described, wherein Timothy P. Denny was plaintiff and Hollon Parker and John F. Boyer were defendants, and which was entirely of equitable cognizance, a final judgment and decree was had and rendered in the district court of the first judicial district of Washington Territory, holding terms at Walla Walla, wherein said plaintiff was granted a money judgment against said Parker, and equitable relief against both said Parker and said Boyer.

That the said Hollon Parker sought to appeal said cause from said district court to said supreme court of Washington Territory.

That at said time the manner of taking such appeal was by a notice of appeal defined in section 458 of the "Code of Washington" at page 114, which is as follows:

"SECTION 458. An appeal or writ of error is taken by filing with the clerk

of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney.

4 Every notice of appeal or writ of error must be signed by the party taking the same or his attorney of record, and must contain the title of the district court in which the proceedings sought to be reviewed were had; a title of the cause as in the district court; a particular description of the judgment, decree, or order sought to be reviewed; and in case of appeal, a particular description of every decision, ruling, order, or decree by which the appellant claims to have been aggrieved, and which he relies upon as a ground for a reversal or modification of the judgment, order or decree; and in case of a writ of error, a particular description of errors assigned, and that said statute is still in force."

That the said defendant John F. Boyer did not join in said appeal as an appellant, nor was he made an appellee therein, as will fully appear by said notice of appeal, so much of which as pertains to said subject is as follows:

"In the district court of the first judicial district of Washington Territory in and for Walla Walla County.

"TIMOTHY P. DENNY, PL'FF AND APPELLEE,
"*vs.*
"HOLLON PARKER AND JOHN F. BOYER
"defts. and appellants.

5 "To Timothy P. Denny, above-named plaintiff, and James K. Kennedy, W. A. George, John B. Allen, and T. J. Anders, attorneys for plaintiff, and A. Reeves Ayres, clerk of said court:

"Please take notice that the defendant Hollon Parker in the above-entitled action, hereby appeals to the supreme court of Washington Territory, holding terms at Olympia, at the July term, A. D. 1883, from the decree and judgment therein made and entered in the district court of the first judicial district of Washington Territory, in and for Walla Walla County, in favor of plaintiff, Timothy P. Denney, in said action, and against the defendants Hollon Parker and John F. Boyer, and from the whole thereof, said decree and judgment rendered on the 31st day of March, A. D. 1882, against defendants Hollon Parker and John F. Boyer." * * * Nor was said notice of appeal ever served on said John F. Boyer, or service thereof waived.

The statute of Washington Territory relative to coparties on appeal is is as follows (page 113, Code of Washington):

"SECTION 454. A part of several coparties may appeal, or prosecute a writ of error; but in such case they must serve notice thereof upon all the other coparties, and file the proof thereof with the clerk of the supreme court."

6 That after divers motions had been determined in said cause, the same was argued on the merits at the regular July term, 1883, and taken under advisement, but before a decision had been reached, by an act of Congress the organization of the supreme court of Washington Ter-

ritory was so altered as to make the same consist of four justices, and to disqualify the justice rendering a decision or judgment from sitting in the review thereof.

That upon suggestion of the death of said appellee, and due showing made, Elizabeth Denny, executrix of the last will of said Timothy P. Denny, deceased, was substituted as appellee in said cause.

That in view of said premises said cause was again placed on the docket of said supreme court for hearing at its regular July term, 1885.

That section 464 of the Code of Washington, page 115, which is as follows, at all of said times prescribed the only means by which, in a cause appealed to the supreme court of Washington Territory, the evidence
7 upon which the same was tried could be certified to said supreme court:

"SECTION 464. In an action by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings, tried upon written testimony, the depositions and all papers which were used as evidence, are to be certified up to the supreme court, and shall be so certified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified unles by direction of the appellant. If so certified, when not material to the determination of the appeal or writ of error, the court may direct the person blameable therefor to pay the costs thereof."

Accompanying a large quantity of written testimony, and a great number of detached papers in said cause, were two certificates, copies of
8 which are, respectively, as follows:

"Certificate of referee.

"I, B. L. Sharpstein, referee in the case of Timothy P. Denney vs. H. Parker and J. F. Boyer, do hereby certify that the foregoing evidence, consisting of five packages or bundles numbered one (1), two (2), three (3), four (4), and five (5) is the evidence written down before me and taken in said action, and that the same, with the documentary evidence returned herewith by me into court, constitute the evidence submitted to and taken by me in said action.

"Dated March 10th, 1882.

"B. L. SHARPSTEIN, *Referee.*

"Certificate of clerk.

"I, A. Reeves Ayres, clerk of the district court of Washington Territory and for the first judicial district thereof, holding terms at Walla Walla, Walla Walla County, in said Territory, do hereby certify that the five packages of testimony herewith transmitted to the supreme court, and numbered by pages from 1 to 1572, is all the testimony in the case of Timothy P. Denney vs. Hollon Parker and John F. Boyer as taken before B. L. Sharpstein, esquire, referee in said case, and by him deposited with

the clerk of said court; and I further certify that the letters, papers,
9 and exhibits herewith transmitted and numbered in red ink figures from 1 to 130, respectively, are all the papers, letters, and evidence introduced in said cause before said referee and by him deposited with the clerk of said court.

"In testimony whereof I have hereunto set my hand and affixed the seal of said district court this 15th day of June, 1883.

[SEAL.] "A. REEVE AYRES, *Clerk*,
"By FRANK W. GOODHUE, *Deputy*,
"*U. S. District Court, First Judical District*,
"*Walla Walla, Washington Territory.*"

The evidence in said cause was in no other manner authenticated.

That afterwards, and on the 22d day of July, 1885, the said appellee duly served and filed in our said supreme court a motion, of which the following is a copy:

"In the supreme court of Washington Territory.

"ELIZABETH DENNEY, EXECUTRIX OF THE estate of T. P. Denney, deceased, appellee,
vs.
"HOLLON PARKER AND J. F. BOYER, APPELLANTS.

"Comes now the appellee above named and moves the court to
10 dismiss the above appeal for the reason that all the co-parties have not joined in said appeal and have not been served with any notice of appeal.

"2nd. Because no evidence is here properly certified.

"JOHN B. ALLEN AND D. J. CROWLEY,
"*Attorneys for Appellee.*"

That the same was argued by counsel for appellee and appellant.

That neither by cross-motion or otherwise did said appellant at any time apply to said supreme court of Washington Territory to furnish any other or different showing relative to the matters involved in said motion other than that disclosed in the record in said cause and heretofore set forth, and that said matters were by said motion first brought to the attention of said court, and that the justices constituting said court, being then and there charged with the judicial determination of the matters in said motion contained, then and there, in the exercise of their judicial functions, and as the determination of said supreme court of said Washington Territory, decided that each of the grounds in said motion contained was well taken, and then and there found that said appellant, Hollon Par-
11 ker, had sought to appeal said cause into said supreme court without his co-party, John T. Boyer, joining him in said appeal, and that no service of the said notice of appeal in said cause had ever been made on said Boyer. And also determined, as in divers causes had since its July term, 1876 (and when its membership was not as at said time), in

like manner determined that the said purported evidence was not so certified into said court as to show to the court that the same constituted all the evidence in said cause upon which the same had been determined in the inferior court, and the said court thereupon rendered its opinion, of which the following is a copy:

"TERRITORY OF WASHINGTON *ss:*

"In the supreme court, of July term, 1885.

"HOLLON PARKER AND JOHN F. BOYER, appellants, "*vs.* "TIMOTHY G. DENNEY, APPELLEE.	Appeal from first district.

"*Opinion.*

"This is a motion to dismiss the appeal.

"The cause was brought here under the appellatory provisions of the code by the appellant, Hollon Parker.

12 "Two grounds of dismissal are urged:

"1st. That no notice of appeal as required by § 454 of the code, was ever served on John F. Boyer.

"2nd. That there is nothing in the transcript to certify this court that it has before it the whole of the evidence.

"Both points we deem well taken. It was necessary and jurisdictional for instituting this appeal to make Boyer a party to it. (Code, § 454, 455, 458; 7 Peters, 399.) But he only could be made a party by a voluntary joinder or appearance, or in the compulsory mode provided by statute. He has not appeared. A notice of intention to appeal was served on him, but no notice of the appeal actually prosecuted was ever given. He is not in court.

"As to the other point, this court, following the case of Coleman vs. Yesler, has several times decided that the whole of the evidence should be certified in an appeal case. This court must have the cause in its entirety before it in order to proceed.

"Section 451 of the code prescribes the form of certificate, and no certificate but the statutory will prevail. We cannot get jurisdiction

13 by stipulation or estoppel or waiver. No statutory certificate is here. The motion is granted.

"ROGER S. GREENE,
"*Chief Justice.*

"We concur.

"JOHN P. HOYT,
"*Associate Justice.*
"GEORGE TURNER,
"*Associate Justice.*"

And thereupon, on motion of counsel for said appellee, for want of jurisdiction to hear and determine said cause upon the merits, rendered its final judgment as follows:

"HOLLON PARKER AND JOHN F. BOYER, appellants,
vs.
"ELIZABETH DENNEY, EXECUTRIX OF THE last will and testament of Timothy P. Denney, deceased, appellee.

"This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the first judicial district of Washington Territory, holding terms at Walla Walla, the motion to dismiss, and upon the argument of counsel, and the court having
14 fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 24th day of July, A. D. 1885, on motion of John B. Allen, esquire, of counsel for appellee, considered, adjudged, and decreed that the appeal from the judgment of the said district court be and the same is hereby dismissed with costs, and that the said Elizabeth Denney, as executrix of the last will and testament of T. P. Denney, recover of and from the said Hollon Parker, appellant, the costs of this action, taxed and allowed at * * * dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said district court; to which ruling of the court appellant by his counsel excepts, and said exception is allowed July 24, 1885."

And these respondents and each of them, answering the allegations contained in the petition respecting the said supreme court of Washington Territory at and prior to the time of rendering said judgment of dismissal or since, being possessed of all the evidence in said cause, say they have no knowledge or information respecting the same sufficient to form
15 a belief, and aver they and each of them have no other knowledge respecting said purported evidence than that imparted by said certificates.

In witness whereof, in open court of said supreme court of Washington, at Olympia, the seat of government of said Washington Territory, we, the said respondents, chief justice and associate justices of the said supreme court, have set our hands and caused the seal of said court to be affixed this 24th day of January, A. D. 1887.

[SEAL].

ROGER S. GREENE,
Chief Justice, &c.
JOHN P. HOYT,
Associate Justice.
GEORGE TURNER,
Associate Justice, &c.

16 (Indorsed:) Sup. Court U. S. 1881. Oct. term. No. 3. Orig'l. Ex parte: In the matter of Hollon Parker, petitioner. Return to rule.

(Stamped:) Office Supreme Court U. S. Filed Feb. 9, 1887. James H. McKenney, clerk.

FILED.
OCT 27 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1885.

No. ——— Original.

Ex Parte in the Matter of the Petition of Helen Parker, for a Writ of Mandamus,

vs.

The Supreme Court of the Territory of Washington, the Honorable Roger S. Greene, Chief Justice, and the Honorable S. C. Wingard, John P. Hoyt, and George Turner, Associate Justices thereof, Respondents.

BRIEF AND ARGUMENT

JOHN H. MITCHELL AND ALFRED S. HUGHES,
COUNSEL FOR PETITIONER.

In the Supreme Court of the United States,

OCTOBER TERM, 1885.—No.—Original.

Ex Parte in the Matter of the Petition of Hollon Parker, for a Writ of Mandamus,

vs.

The Supreme Court of the Territory of Washington, the Honorable Roger S. Greene, Chief Justice, and the Honorables S. C. Wingard, John P. Hoyt, and George Turner, Associate Justices thereof, Respondents.

Brief and Argument of JOHN H. MITCHELL *and* A. E. ISHAM, *Counsel for Petitioner.*

STATEMENT OF CASE.

The purpose of the petition in this case is to obtain a peremptory writ of mandamus directed to the Supreme Court of Washington Territory, commanding that Court to reinstate an appeal from a decree of the District Court of the Territory for the First Judicial District, in a suit in equity, wherein Elizabeth Denney, executrix of the estate of Timothy P. Denney, is plaintiff, and Hollon Parker and John F. Boyer are defendants, and which appeal was taken by Hollon Parker, one of said defendants, and was by said Supreme

ington Territory, in deciding the motion for dismissal of the appeal in this cause, labored to a certain extent under a misapprehension of the material *facts*.

Permit a repetition of those material to the decision.

First. The appeal was taken to the July Term of that Court, A. D. 1883; the transcript and notice of appeal having been filed in that Court June 19th, 1883.

Second. At that term of the Court, July, 1883, the appellee, through counsel, filed a motion to dismiss the appeal. This motion, after argument, was over ruled by the Court, the Court, while holding that the notice of appeal was too prolix and that certain portions of it should be stricken out, held the appeal good and suggested an amendment of such notice. The Court, in its opinion, remarking among other things as follows: "We feel compelled to strike from the notice, therefore, all in it relating to interlocutory matters; this will not necessitate a dismissal of the appeal, although it may render an amendment of the notice desirable."

Third. In accordance with this ruling, *overruling* the motion to dismiss appeal (at the July Term, 1883), and upon the suggestion of the Court as to the amendment of notice of appeal, the appellant, this petitioner, filed July 13th, A. D. 1883, an amended notice of appeal.

Fourth. At said July Term, 1883, that Honorable Court, having overruled the motion of appellee for a dismissal of appeal, entertained jurisdiction of the cause and proceeded to hear it on its merits, and, after a four days' argument by counsel of respective parties, the cause was by the Court taken under advisement.

Fifth. That, by reason of the creation by Congress of a new

Judicial District in Washington Territory, and the appointment of a fourth Judge, (Judge George Turner), the quorum of that Honorable Court, necessary to a decision of said cause, was broken, and the cause was for this reason ordered by the Court set down for re-argument.

Sixth. That, not until this cause was reached for re argument, in pursuance of the order of the Court aforesaid, to-wit: on July 22nd, A. D. 1885, and not until appellant's counsel had commenced his argument on the merits, did the appellee submit the last and final motion for dismissal of the appeal.

But it is material to inquire precisely what was done, and what the record of that Court shows to have been done by appellant, Parker, prior to the filing of such notice of appeal and transcript, in pursuance of the requirements of Sec. 454 of the Code of Washington Territory. The record shows (see affidavit of A. E. Isham, attorney for appellant, Parker, on page 33 of petition on file), that, on the 19th day of June, 1882, he served on the co-defendant. John F. Boyer, a notice, of which the following is a true copy, to wit:

"In the District Court of the First Judicial District of Washington

"Territory in and for Walla Walla County,

"TIMOTHY P. DENNEY, Plaintiff,

vs.

"HOLLON PARKER and JOHN F. BOYER, Defendants,

"To John F. Boyer, one of the defendants in the above entitled "cause:

"You will please take notice that your co-defendant, Hollon "Parker, in the above entitled action, will on this, the 19th day of

ington Territory, in deciding the motion for dismissal of the appeal in this cause, labored to a certain extent under a misapprehension of the material *facts*.

Permit a repetition of those material to the decision.

First. The appeal was taken to the July Term of that Court, A. D. 1883; the transcript and notice of appeal having been filed in that Court June 19th, 1883.

Second. At that term of the Court, July, 1883, the appellee, through counsel, filed a motion to dismiss the appeal. This motion, after argument, was over ruled by the Court, the Court, while holding that the notice of appeal was too prolix and that certain portions of it should be stricken out, held the appeal good and suggested an amendment of such notice. The Court, in its opinion, remarking among other things as follows: "We feel compelled to strike from the notice, therefore, all in it relating to interlocutory matters; this will not necessitate a dismissal of the appeal, although it may render an amendment of the notice desirable."

Third. In accordance with this ruling, *overruling* the motion to dismiss appeal (at the July Term, 1883), and upon the suggestion of the Court as to the amendment of notice of appeal, the appellant, this petitioner, filed July 13th, A. D. 1883, an amended notice of appeal.

Fourth. At said July Term, 1883, that Honorable Court, having overruled the motion of appellee for a dismissal of appeal, entertained jurisdiction of the cause and proceeded to hear it on its merits, and, after a four days' argument by counsel of respective parties, the cause was by the Court taken under advisement.

Fifth. That, by reason of the creation by Congress of a new

Judicial District in Washington Territory, and the appointment of a fourth Judge, (Judge George Turner), the quorum of that Honorable Court, necessary to a decision of said cause, was broken, and the cause was for this reason ordered by the Court set down for re-argument.

Sixth. That, not until this cause was reached for re argument, in pursuance of the order of the Court aforesaid, to-wit: on July 22nd, A. D. 1885, and not until appellant's counsel had commenced his argument on the merits, did the appellee submit the last and final motion for dismissal of the appeal.

But it is material to inquire precisely what was done, and what the record of that Court shows to have been done by appellant, Parker, prior to the filing of such notice of appeal and transcript, in pursuance of the requirements of Sec. 454 of the Code of Washington Territory. The record shows (see affidavit of A. E. Isham, attorney for appellant, Parker, on page 33 of petition on file), that, on the 19th day of June, 1882, he served on the co-defendant. John F. Boyer, a notice, of which the following is a true copy, to wit:

"In the District Court of the First Judicial District of Washington

"Territory in and for Walla Walla County,

"TIMOTHY P. DENNEY, Plaintiff,

vs.

"HOLLON PARKER and JOHN F. BOYER, Defendants,

"To John F. Boyer, one of the defendants in the above entitled "cause:

"You will please take notice that your co defendant, Hollon "Parker, in the above entitled action, will on this, the 19th day of

"June, 1882, file a notice of appeal and stay bond, and appeal said "cause to the Supreme Court of Washington Territory, holding "Terms at Olpmpia, July Term, 1883, and you are herewith "requested to join in said appeal.

"A. E. ISHAM,

"Attorney for Hollon Parker, defendant.

"Dated this 19th day of June, 1882."

That, on the 19th day of June, 1882, said co-defendant, John F. Boyer, accepted service of said notice by writing on the original thereof and signing his name to the same as follows:

"I hereby accept service of the above notice this 19th day of "June, 1882, and decline to join in an appeal in said, cause wherein "T. P. Denney is plaintuff, and Hollon Parker and John F. Boyer are "defendants.

"JOHN F. BOYER, Defendant."

That the original of said notice of appeal, so served on said Boyer, together with his acceptance of service thereof, and his written declination to join in said appeal, was duly filed in that Court on the 9th day of July, A. D. 1883, and proof of such service and acceptance of service by said Boyer, and of his declination to join in said appeal, had been duly filed with the Clerk of the Supreme Court, as appears from affidavit of A. E. Isham, filed, a copy of which is as follows:

"In the Supreme Court of Washington Territory, July Term, A. D. 1885.

"TIMOTHY P. DENNEY, Appellee,

vs.

"HOLLON PARKER and JOHN F. BOYER, Appellants.

"TERRITORY OF WASHINGTON, } ss.
"THURSTON COUNTY, }

"I, A. E. Isham, being first duly sworn, depose and say I am "the attorney for Hollon Parker, the above named appellant, and "have been such attorney of record all the time since said action "was commenced. That, on the 19th day of June, 1882, at the "City of Walla Walla, in Walla Walla County, Washington Territory, "between the hours of 9 A. M. and 3 P. M. of said day, I served on "the defendant above named, John F. Boyer, a written notice by "then and there giving to him a full and true copy of the same' "notifying him that his co-defendant, Hollon Parker, would appeal "said cause to the Supreme Court of this Territory. The original "said notice is dated June 19th, 1882, and filed in this Court July "9, 1883, marked exhibit "A," and herewith made a part of this "affidavit.

"That said notice was served on said John F. Boyer, before the "notice of appeal was filed or served in said cause on the plaintiff "or his attorney of record, and that, after serving said John F. Boyer "on said day, I filed the notice of appeal which appears of record "in this cause. That the party, John F. Boyer, who accepted ser "vice on said original notice of appeal, filed as aforesaid, and who "declined to join with his co-defendant, Hollon Parker, is the same

"person who signed his name to the said notice of appeal, and who "is the co-defendant in the above entitled cause.

"A. E. ISHAM.

[SEAL]. "Subscribed and sworn to before me this July 22, 1885,

"R. G. O'BRIEN, Clerk."

It is respectfully submitted, that the Court was in error in entertaining the last motion to dismiss the appeal, for the reason that the question as to the validity of such appeal had been two years before raised by the appellee, argued by counsel, and decided by the Court. It was therefor *res judicata*. The *very* question, as to the *jurisdiction* of this Court to entertain said appeal, was the question raised, argued, and decided, two years before.

The motion of the appellee, at the recent term of said Court, July, 1885, was a motion in the nature of a petition for rehearing, and came too late.

Rule XIV. of the rules of that Court provide as follows: "Every petition for rehearing must be filed before the close of the "term at which the decision is made."

* * * *

True it is, that the question raised by the last motion to dismiss appeal, is one of jurisdiction, and it is also quite true, as is well stated in the opinion of that Honorable Court, in allowing such motion, that the Court "cannot get jurisdiction by stipulation or "waiver;" and we may also admit the *general rule*, that the question of jurisdiction can be raised at any stage of the proceeding; but, while these things are all true, it is *also* true that the Court was the

judge, in the first instance, as to its own jurisdiction, and as to the facts necessary to give it jurisdiction, and, when that *precise question* has once been *raised* and *argued by counsel*, and submitted and *decided by the Court*, that is an end of the matter, unless, indeed, a rehearing of the question is ordered, and, if a rehearing, it must be within the time fixed by law and the rules of the Court for such a proceeding.

When the question of jurisdiction has once been *decided*, after assignment of grounds against the jurisdiction and argument by counsel, then the question is settled; and the appellee will not, two years later, and after jurisdiction has been entertained, and the case argued and submitted *on its merits*, be permitted to again raise the question of jurisdiction, although he assigns new grounds, and this upon the doctrine of *res judicata*.

It has indeed been said, that the entertaining cognizance of a case, is a conclusive finding of the facts constituting jurisdiction.

Cox *vs.* Thomas, 9 Gratt., 323.

Clary *vs.* Hoggland, 6 Cal., 685.

Washington Bridge Co. *vs.* Stewart, 3 How., 413.

But, now, as to the merits of the motion. It is respectfully submitted that the record in this case shows a substantial, and in fact a full, compliance with the requirements of Sec. 454 of the Code of Washington Territory, in reference to notice of appeal on co-defendant. The question is *not* whether one of several co-parties can, in the absence of this statute, appeal without the others joining,

and therefore the decision in 7 Peters, 399, is not applicable to the case at bar. This Section of the Code provides, that a "part of "several co parties may appeal without joining his co-partner, pro- "vided, always, that they must serve notice thereof upon all the "other co-parties, and file proof thereof with the Clerk of the "Supreme Court." What is the object or purpose of the law, in requiring such "notice thereof" to be served on a co-defendant? Simply to give him notice of the *fact* that an appeal is *to be* taken, to the end that he may have an opportunity to join in such appeal, if he wish. It is not required that the notice so served shall, as in the case of the notice served on the appellee, contain certain specific things, as required by Sec. 458 of the Code of Washington Territory. In the *one* case, that of the co-party served, the purpose of the law is met by simply serving on him a notice of the *fact* that an appeal is *about* to be taken, not that an appeal has been taken, which would make him a party to the appeal without giving him the right of election to join, or decline to join, in the appeal. In the case of the notice served on the appellee, all the specifications, mentioned in Sec. 458 of the Code, must be set out, including * * * "a "particular description of every decision, ruling, order or decree, by "which the appellant claims to have been aggrieved, and which he "relies upon as grounds for a reversal or modification of the judg- "ment, order, or decree."

* * * *

That the notice, referred to in Sections 454 and 455, is, by the law-maker, intended to be a different character of notice from that referred to in Sec. 458, is clearly apparent from what follows in Sec. 455, when it says: "If the other co-parties refuse to join, they can

"not, nor can any of them, take an appeal, or writ of error, after-
"wards, nor shall they derive any benefit from the appeal."

* * * *

Refuse to join, with whom and in what? Most assuredly with the moving party, and *in* the appeal which he *proposes* to take. Clearly, the law, therefore, contemplates that the notice on a co-party, required by Sec. 454 of the Code, is a notice to be served *before* an appeal is taken, before any notice of appeal is served or prepared for service on the appellee, as required by section 458, so that such co-party may, if he wish, join the moving party in such notice of appeal, so *to be* served on the appellee, and, in case the co-party refuses to join in the appeal, and the moving party "files "proof thereof with the Clerk of the Supreme Court," under Sec. 454, he is not entitled to any further notice from his co-party, and is not a necessary party to any further record or proceeding in the cause, for the reason the statute declares, "nor shall they derive any "benefit from the appeal." (Sec. 455, of the Code).

It is submitted, confidently, therefore, that the notice required to be served by Sec. 454, on a co-party, is *not* the regular notice of appeal which Sec. 458 requires to be served on the appellee, or adverse party, but simply a notice of the *fact* that the party serving the notice is about to appeal, and to the end that he may, if he wish, join him in such appeal. If a co-party, when notified, as required by Sec. 454, *declines* to join his co-party in the appeal, then the facts operate as a limitation of his right to appeal. He cannot appeal afterwards, nor shall he receive any benefit from the appeal. His rights in the premises are at an end, and he should not be made a party, in any sense of the word, to the appeal. Hence, he should

not receive any notice of * * * * "a particular description "of every decision, ruling, order or decree," * * * * relied upon by appellant for a reversal or modification of the judgment, order or decree.

It is further provided in Sec. 456 that, "unless they appear and "decline to join, they shall be deemed to have joined, and shall be "liable for their due proportion of costs." No costs can be imposed upon them by the service of *the* notice of appeal, without first giving them the right of election to join in the appeal, by the service of a simple notice of the appellant's desire to appeal, and his desire to make them a party to the appeal under Sec. 454 of the Code.

But, aside from all questions as to the character of the notice to be served on a co-defendant, the co party in *this* case has come into Court and placed himself on the record of the Supreme Court of Washington Territory, under section 454, and entered his appearance in the case, declining over his own signature to join in an appeal. He says: "I decline to join in an appeal in said cause," reciting the cause by its title. What more is required? Was he not notified? Did he not have an opportunity to join in the appeal? Has he not, in writing, declined to join? Surely nothing more can be required, in so far as this question is concerned, to have given the Supreme Court of Washington Territory jurisdiction, under this statute, of the separate appeal of Hollon Parker, appellant.

But, not only so. The record in this case shows that Boyer made default in the Court below, never appeared therein, in person or by attorney, never filed any pleading, and judgment and decree was entered against him by default. Boyer, therefore, had no right to appeal. He could not legally have either joined with Parker in his appeal or taken one himself.

Flake *vs.* Van Wagenon, 54 N. Y., 25.

McMahon *vs.* Rauhn, 47 N. Y., 67-72.

Jones *vs.* Purcell, 58 N. Y., 389.

It is submitted, furthermore, that the judgment and decree in the Court below, against the defendants, is not a joint judgment or decree.

Upon the contrary, it is clearly, in every sense of the word, a *several* judgment and decree. The records show that the decree against the defendant, Boyer, simply directs him to convey to plaintiff certain specified real estate, and this is all there is to it; while the decree against defendant, Parker, directs him to convey to plaintiff, certain *other* specified real estate, and in addition to respond in a certain amount, in money. In no sense of the term, therefore, can it be said that the decree is a *joint* one, or joint *and* several; but, in every sense of the term the *decrees* are in their nature *distinct* and *several*.

In the absence of any statute, the law is well settled that, where a judgment or decree is *joint*, all the parties against whom a *joint decree* is rendered must join in the appeal; and, anciently, it was held by the Courts that, in such a case, where one of the parties refused to join, the other wishing to proceed, could do so by what was known to the law as summons and severance. But it has been held, where a judgment or decree is *not* joint, or joint or several, but purely several, that, then, any party to such judgment or decree could appeal alone.

The Supreme Court of the United States, however, has declared,

quite recently, that this old doctrine of a remedy by summons and severance has fallen into disuse, and, in the case of a joint judgment or decree, this Court now hold to the doctrine that, if only one of the parties to such decree wishes to appeal, he can do so by simply notifying his co-party or co-parties of the appeal, and if they, after being so notified, do not appeal that, then, the moving party will be permitted to proceed alone.

Masterson *vs.* Hernden, 10 Wallace, 416.

Germain *vs.* Mason, 12 Wallace, 259.

O'Dowd *vs.* Russell, 14 Wallace, 402.

There can be no doubt that the provisions of the Code of Washington Territory, Secs. 454 to 456 inclusive, are based upon this latter doctrine of the Supreme Court of the United States, namely, that, instead of requiring one of several co defendants who wishes to appeal to get his remedy through the ancient means of summons and severance; or in other words, by process issued out of the Court and duly served as a summon, he is simply required to serve a notice in writing of his intention to appeal, on his co-defendants, and file proof thereof with the Clerk of the Supreme Court.

Clearly, in the absence of any statute, such would be the law to-day. It is equally clear that the provisions of the Code in question simply incorporate this doctrine into the statute.

In the case of Masterson *vs.* Hernden, *supra*, Mr. Justice Miller, in discussing these questions, uses the following language:

"We do not attach importance to the technical mode of

"proceeding called summons and severance. We should have held "this appeal good, if it had appeared *in any way by the record* that "Maverick had been notified in writing to appear, and that he had "failed to appear, or, if appearing, had refused to join. But the "mere allegation of his refusal, in the petition of appellant, does not "prove this. We think there should be a written notice and due "service, or the record should show his appearance and refusal, and "that the Court on that ground granted an appeal to the party who "prayed for it, as to his own interest."

And in the case of O'Dowd *vs.* Russell, *supra*, this Court held, that "such a writ of error would be sustained, if it appeared from "the record that the defendants, not joined, had been notified in "writing, and had refused to join. In this case, it appears by the "record that written notice was given to the co-defendants of "O'Dowd, and they declined to join. This was equivalent to sum-"mons and severance."

In the case under consideration, these requirements of law have been fully and completely met. A notice in writing was served; proof of that service was made and filed in that Court; besides, the record shows the appearance of Boyer, and his refusal in writing to join in the appeal.

Further, it has been held, that the appeal will not be dismissed for want of necessary parties, when, as between the parties to the appeal, the decision appealed from may be reversed or modified in

some substantial particular, without affecting the rights of other parties to the litigation in the Court below, under such decision, who have not been made parties to the appeal.

In the case of Germain *vs.* Mason, *supra*, this Court held: "In the case before us, the writ is sued out by Germain alone, who "is the only party mentioned as damaged by the alleged error of the "Court, and who alone gives the appeal bond. If, therefore, Ger. "main can bring the writ without joining other parties as plaintiffs "in error, the writ is not defective."

We insist that, by the appearance of John B. Allen, attorney for appellee, at the July Term, 1883, of the Supreme Court of Washington Territory, and his argument and submission of said case on its merits, that he waived all right to question the jurisdiction of that Court in regard to the joinder or non-joinder of the co-defendants in the case; and the Court ought to have again heard and determined the case on its merits.

The appellee's right to join co-defendants, or his objection to their non-joinder, had been waived. It was a mere irregularity, if any, which should have been taken advantage of at the proper time.

Amis *vs.* Smith, 16 Peters, 301. (Reports of the Supreme Court of the United States by Frederick C. Brightly, vols. 15, 16, original report, 303).

This Court, in that case, decided as follows: "It has been sued "out and prosecuted by one of several co-defendants; and, without "asking that the other defendants should be summoned and "served, the defendant has, however, appeared and defended the "suit, and thereby waived the irregularity."

In support of the same principle we refer to

Poppleton *vs.* Nelson, 10 Oregon, p 437.

As a further proposition of law, bearing upon the question as to whether or not a failure to certify up all the testimony, when the appeal comes up, is a jurisdictional question, and the grounds upon which an appeal may be dismissed, we respectfully suggest, that the certificate of the Clerk is *prima facie* evidence, when nothing appears in the transcript to the contrary, that all of the evidence has been certified up, and that great faith should be given to the certificate of the Clerk below.

The Rio Grande, 19 Wallace, p. 178.

In this case this Court says: "But if not, it is quite clear that "the certificate of the Clerk of the Court must be regarded as *prima* "*facie* evidence that the matter of fact alleged in the motion is not "well founded."

In the State of California and other States wherein cases of law are brought up on bills of exception, and cases in equity are brought up on appeal, with what is called a *statement*, which takes the place of *all the testimony*, or of a bill of exceptions, it has been frequently held that a failure to send up such statement is not a ground upon which an appeal may be dismissed for want of jurisdiction.

Solomon *vs.* Reese, 34 Cal., 28.

In the case of Solomon *vs.* Reese, *supra*, the Court said:

"The point, that we cannot entertain the appeal, because the "record does not contain a statement of the grounds of appeal, is also "untenable. The case comes here upon the judgment roll, and, "where such is the case, no statements of the grounds of appeal is "required. (Hutton *vs.* Reed, 25 Cal., 478.) So of the objection,

"that the transcript does not contain all that is required by the "346th section of the Practice Act. If there was anything in the "objection, it should have been made before the argument, so that "the appellant could have had an opportunity to supply the missing "papers."

See, also, Bennett *vs.* His Creditors, 22 Cal., p. 43.

Ross *vs.* Roadhouse, 36 Cal., p. 581.

St. John *vs.* Kidd, 26 Cal., p. 264

It is further respectfully submitted, that the record with the Court below shows various questions arising upon the pleadings and judgment roll—among others the question that the complaint does not state facts sufficient to constitute a cause of suit; also, that the pleadings are insufficient to sustain the report of the referee and the decree of the Court; also various other questions—all of which the appellant Parker is ready to have passed upon by the Court, irrespective of any questions of fact involved in the case.

Bearing upon this proposition, we submit the following authorities:

MacAbee *vs.* Randall, 41 Cal., p. 136.

In the case of MacAbee *vs.* Randall, *supra*, the Court held that, on an appeal from a judgment, without a bill of exceptions, or statement of the evidence, the Court would review the judgment roll, and in Harper, administratrix, *vs.* Minor *et al.*, 27 Cal., 107, "that on an appeal from a judgment, the Court will review the judgment roll."

But, now, as to the other point in the case, as stated in the opinion of the Court below, namely: "That there is nothing in the transcript to certify this Court that it had before it the whole of the "evidence." Assuming, for the present, and only for the sake of

this argument, that the certificate of the Clerk of the Court below as to the evidence is a jurisdictional matter, we respectfully submit, a careful examination of these certificates on file will show a full compliance with all the provisions of law and rules of that Court on that subject. In the first place, Sec. 451 of the Code does not require, in terms or inferentially, that the Clerk shall ***state in his certificate*** that "the transcript contains all the evidence introduced," etc.; it only requires that "it ***shall appear*** from such certificate * * * "that the transcript contains all the evidence introduced by the "parties." * * * * If, therefore, the certificate is of such character as to cause it to appear to the Court that all the evidence is contained in the transcript, then, it is quite immaterial by what language, or by what particular words, this fact is made to appear in said certificate. The Supreme Court of Washington Territory has prescribed a form for such certificates, (Rule II. of Rules of Supreme Court of W. T.) wherein, instead of requiring that the certificate shall state that the "transcript contains all the evidence," etc., it simply requires that the Clerk shall certify that "the foregoing is a "full, true, and correct transcript of so much of the record, in the "above entitled cause, as I am by statute required, on appeal, to "transmit to the Supreme Court."

This, then, is the construction placed by the Court below on Sec. 451 of the Code, in so far as such section relates to the character of the Clerk's certificate on appeal. This rule, and this construction, have been literally followed in this case, word for word, letter for letter. Surely, members of the bar ought not to be misled by any such form, prescribed as a rule of Court, to their prejudice; besides the form prescribed is fully warranted by the statute.

But not only so, Sec. 459 of the Code provides, that, "Upon

"payment of his fees, the Clerk shall forthwith transmit, by mail, * * * * a transcript of the record in the cause, or so much "thereof as the appellant or plaintiff in error, *in writing in the "notice, has directed.*"

Turning to the notice in writing filed in this particular cause, it will be found that the appellant directed the Clerk as follows:

"And, you, the Clerk of said Court, will please transmit to the "Supreme Court, *all the papers filed* in this cause, (except "subpœnas) as by law provided in Secs. 459 and 464, Code of 1881, "together with your certificate as provided in rule 2 of the Supreme "Court."

The certificate of the Clerk in this case, after setting out in *hæc verbæ*, all that the rule of Court *supra* requires, goes on to state, further, that he has fully complied with the directions of appellant. Those directions, as we have seen, were to send up *all the papers filed in the case*, except subpœnas; and the Clerk has certified that he has sent up *all* that he was *directed* to send up. Can it, thererore, with any degree of propriety, be said that it does not "appear from the certificate of the Clerk," as provided in Sec. 451, that the "transcript contains all the evidence introduced by the "parties in the Court below?"

It seems, most clearly, that such a construction cannot be maintained.

To save trouble in referring to the record, the full copies of such certificates are here given as follows:

CERTIFICATE "A."

"TERRITORY OF WASHINGTON, } ss.
"First Judicial District. }

"I, A. Reeves Ayres, Clerk of the District Court of Washington "Territory, and for the First Judicial District thereof, holding terms "at Walla Walla city, Walla Walla county, Washington Territory, do "hereby certify that the foregoing is a full, true, and correct tran- "script of so much of the record in the above entitled cause as I am "by statute, and directions of attorneys in said cause, required to "transmit to the Supreme Court. In testimony whereof, I have "hereunto set my hand and the seal of said District Court, this 15th day of June, A. D. 1883.

"A. REEVES AYRES, Clerk.

"By FRANK W. GOODHUE, Deputy, U. S. District Court, First Judicial [SEAL] District, Walla Walla, Washington Territory."

The certificate of the clerk, attached to the evidence, is as follows:

CERTIFICATE "B."

"TERRITORY OF WASHINGTON, } ss.
"First Judicial District. }

"I, A. Reeves Ayres, Clerk of the District Court of Washington "Territory, and for the First Judicial District thereof, holding terms "at Walla Walla, Walla Walla county, in said Territory, do hereby "certify that the five packages of testimony herewith transmitted to "the Supreme Court, and numbered by pages, from 1 to 1,572, is "all the testimony in the case of Timothy P. Denney *vs.* Hollon "Parker and John F. Boyer, as taken before B. L. Sharpstein, "Esquire, referee in said case, and by him deposited with the clerk "of said Court. And I further certify, that the letters, papers and

"exhibits, herewith transmitted and numbered in red ink figures, from "1 to 130 respectively, are all the papers, letters and evidence intro- "duced in said cause before said referee, and by him deposited with "the Clerk of said Court.

"In testimony whereof I have hereunto set my hand and affixed "the seal of said District Court, this 15th day of June, 1883.

"A. REEVES AVRES, Clerk.

"By FRANK W. GOODHUE, Deputy, U. S. District Court, First Judi- [SEAL.] cial District, Walla Walla, Washington Territory."

And the certificate of the referee, certifying the evidence to the Court, is as follows:

CERTIFICATE OF REFEREE.

"I, B. L. Sharpstein, referee in case of Timothy P. Denney *vs.* "H. Parker and J. F. Boyer, do hereby certify that the foregoing "evidence, consisting of five packages or bundles, numbered one "(1), two (2), three (3), four (4), and five (5), is the evidence written "down before me and taken in said action, and that the same, with "the documentary evidence returned herewith, by me, into Court, "constitutes the evidence submitted to, and taken by me, in said "action.

"Dated, March 10th, 1882.

"B. L. SHARPSTEIN, Referee."

Nothing could be more definite and certain than these certificates, and it is confidently contended, that it *does appear* from the certificates, that the transcript "contains *all* of the evidence intro- "duced by the parties on the trial in the Court below," and it is, therefore, sufficient. The Clerk has, in this instance, literally complied with the Code of Washington Territory, and with the rule of

the Supreme Court of that Territory. And, with all due deference to the Court, we must insist, that the case of Coleman *vs.* Yesler, I. Washington Territory report, page 591, has no bearing, whatever, upon the case at bar. In that case the certificate was as follows:

"TERRITORY OF WASHINGTON, } ss.
"Third Judicial District. }

"I, James Seavey, Clerk of the District Court of the Third "Judicial District, etc., do hereby certify the foregoing to be a true, "full and correct transcript of the record in the action wherein "Henry L. Yesler is plaintiff, and James M. Coleman is defendant, "as appears, and is included within pages — to — herein inclusive.

"Witness my hand and the seal of the said Court, at Seattle, "this, the — day of ——, A. D, 1879.

"JAMES SEAVEY, Clerk.
"By JAMES M. LUDLOW, Deputy."

In reference to such a certificate, the Court has well said, "such "a certificate is obviously void, both for want of definiteness in "describing the matter certified as a transcript, and for lack of the "seal of the Court below."

This case was an action at law, and came up by writ of error, and the evidence could not be transmitted to the Supreme Court of Washington Territory in its original form, which must be done in the case at bar, under Sec. 464 of the Code of Washington Territory.

Nothing was said in that certificate about sending "the record in the "above entitled cause, as I am by statute required," and as directed in the notice of appeal by appellant, under Sec. 459. Hence, we insist that, we are not asking this Court to change or modify any established rule of practice, or change any law of the Territory of Washington. But, further, in the examination of this question sight should not be

lost of the familiar and well settled principle of law, that the presumption is that official duty has been regularly and faithfully performed until the contrary appears.

Hartwell *vs.* Root, 10 Am. Dec., 232.

Terry *vs.* Blight, 16 id., 101.

It must be presumed that the transcript contained all the evidence which the Clerk, under the law, was required to send up.

Hilden *vs.* Jordan, 28 Cal., 302.

Smith *vs.* Alben, 34 Cal., 506.

Waiving, for the present, all questions as to the sufficiency of the certificates, it is insisted that this is not a jurisdictional question. What are the acts necessary to be done under the statutes of that Territory to constitute a valid transfer of a cause in equity to the Supreme Court by appeal?

They are few and simple, and clearly defined by the statute.

First. Section 458 of the Code provides how an appeal shall be taken, namely: "An appeal is taken by filing with the Clerk of "the Court, in which the judgment or order appealed from is "entered, a notice stating the appeal from the same, or some specific "part thereof, and serving a copy of said notice on the adverse "party or his attorney."

This section further provides what shall be stated in the notice of appeal, which we have had occasion heretofore to refer to, and among other things is as follows:

"A particular description of every decision, ruling, order or "decree, by which the appellant claims to have been aggrieved, and

"which he relies upon as a ground for a reversal or modification of "the decree."

The simple compliance with this section of the Code, and service of the notice on the appellee, constitutes an appeal, and Sec. 457 provides how and when an appeal shall be perfected, as follows: "Section 459. An appeal shall not be perfected until the notice "thereof has been served upon the adverse party or his attorney of "record." And, further, "Upon the payment of his fees, the Clerk "shall forthwith transmit * * * * a transcript of the record "in the cause, or so much thereof as the appellant * * * * * "in writing in the notice has directed, to which shall be appended "copies of the notice of appeal and the supersedeas bond, if any."

Section 460 prescribes the next, last and only other requirement necessary to perfect an appeal, that is:

"The notice of appeal * * * * must be served at least "30 days, and the cause filed and docketed at least 15 days, before "the first day of the next term of Supreme Court."

All these things done, as required by Sections 458, 459 and 460, *supra*, and an appeal is *taken* and *perfected* and the jurisdiction of the Supreme Court is complete—whatever else is required by other sections of the statute, are not jurisdictional requirements.

True, there must be *a transcript*, that is to say, there must at least be a transcript of the pleadings and judgment entry filed and notice of appeal, in order to perfect an appeal and give jurisdiction. If nothing more is sent up, then, of course, any question of error appearing on the face of the record could be determined.

No question of fact could be determined, and, if the record should be defective in that, all, or none, of the evidence has been sent up by the clerk, this would not be a ground of dismissal of the